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A NEW

ABRIDGMENT OF THE LAW.

BY MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

WITH

LARGE ADDITIONS AND CORRECTIONS,

BY SIR HENRY GWYLLIM,

AND

CHARLES EDWARD DODD, ESQ.

AND WITH

THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED IN 1809,

BY BIRD WILSON, ESQ.

TO WHICH ARE ADDED

NOTES AND REFERENCES TO AMERICAN AND ENGLISH LAW AND DECISIONS,

BY JOHN BOUVIER.

VOL. V.

167001
10/11/21

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 197 CHESTNUT STREET.
1860.

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IDIOTS AND LUNATICS.

(A) What Persons are esteemed such, so as to come within the Protection of the Law.

(B) How they are to be found such.

(C) Who hath an Interest in, and Jurisdiction over them: And herein of appointing them proper Curators and Committees, and the Power and Duty of such Committees.

(D) How far their Want of Understanding shall be said to be prejudicial to them in Civil Respects.

(E) How far the Want of Understanding will excuse in Criminal Cases.

(F) How far their Acts are good, void, or voidable.

(G) How they are to sue and defend.

(A) What Persons are esteemed such, so as to come within the Protection of the Law.

THE more general description of a person, who, from his want of reason and understanding, comes within the protection of the law, is that of *non compos mentis.*

Co. Lit. 246; 4 Co. 124; Skin. 177. βShelf. on Lun. 1; 1 Phillim. R. 100.*g* [The same rules of judging of insanity prevail at law and in equity, Osmond v. Fitzroy, 3 P. Wms. 130; Bennet v. Vade, 2 Atk. 327, though Sir Wm. Blackstone in 1 Comm. 304, seems to point at a difference. For, if a return to an inquisition state the party to be incapable of managing himself and his affairs, from the weakness of his mind, a commission of lunacy will not issue, the Court of Chancery having never gone further from the ancient returns, which were *lunaticus vel non*, than in allowing returns of *non compos mentis*, or *insanæ mentis*, or, since the proceedings have been in English, of unsound mind, which amounts to the same thing. *Non compos mentis* is now indeed a proper technical term, being legitimated by several acts of parliament. *Ex parte* Barnesley, 3 Atk. 168: Lord Donegal's case, 2 Ves. 407.] ‖ But the practice of later times hath gone beyond this rule, and indeed Lord Hardwicke himself, when he presided in the Court of King's Bench, cites a case in which it had before that time been departed from. Pitt's case, cited in Ca. temp. Hardw. 52; 2 Barnardist. 457. For as the commission is not a commission of lunacy, but only *in the nature* of a writ *de lunatico inquirendo*, the court has thought itself at liberty to issue it, where the party is from any cause, whether age, disease, affliction, or intemperance, incapable of managing his own affairs; Gibson v. Jeyes, 6 Ves. 273; Ridgeway v. Darwin, 8 Ves. 65. *Ex parte* Cranmer, 12 Ves. 445; for the prerogative is merely this, that it falls to the king to take care of those who cannot take care of themselves, 8 Ves. 449.‖

There are, says my Lord Coke, four kinds of men who may be said to be *non compos.* 1. An idiot, is *non compos* from his nativity. 2. One made such by sickness. 3. A lunatic, *quia aliquando gaudet lucidis intervallis*, who is *non compos* only for the time that he wants understanding. 4. One that is drunk; which last is so far from coming within the protection of the law, that his drunkenness is an (*a*) aggravation of whatever he does amiss.

Co. Lit. 247; 4 Co. 124. Vide 1 Hale's Hist. P. C. 30 to 37. (*a*) Plowd. 19. *Omne crimen ebrietas incendit et detegit.*

(A) What Persons are esteemed such.

1. An idiot is a fool or madman from his nativity, and one who never has any lucid intervals; therefore, the king has the protection of him, and his estate during his life, without rendering any account; because it cannot be presumed that he will be ever capable of taking care of himself or his affairs; and such a one is described a person that *cannot number* twenty, tell the days of the week, does not know his father or mother, his own age, &c. But these are mentioned as instances only; for idiot or not, being a question of fact, must be tried by a jury, or inspection.

Dyer, 25; Moore, 4; Bro. *Idiot*, 1; F. N. B. 233. β Chit. Med. Jur. 345, 327, note (*s*); 1 Russ. on Cr. 6; Shelf. on Lun. 2; Ayl. Pand. 234; Brown v. Fisher, 4 Johns. Ch. R. 441.*g*

But though an idiot must be so *a nativitate*, yet, if by inquisition it be found that A is an idiot, not having any lucid intervals *per spatium octo annorum*, this is a sufficient finding; for the inquisition having found the party an idiot, the adding *per spatium octo annorum* is surplusage, and shall be rejected.(*a*)

Prodgers v. Frazier, 3 Mod. 43; 2 Chan. Cas. 70. S. C.; Skin. 5, 177, S. C.; 2 Ves. 408, S. C., cited. β The inquisition is only *primâ facie* evidence of the invalidity of an act done by a lunatic or drunkard before the issuing of the commission, but which is overreached by the finding of the jury. L'Amoureaux v. Crosby, 2 Paige, 422.*g* ‖(*a*) Neither *lunaticus* nor *idiota* is to be found in the statute of E. 2. The latter word occurs in the old writs in the Register, and also in Fleta, but in a larger sense than it now bears, applying not only to natural fools, but to all persons labouring under mental incapacity. It had ceased, however, to be used in any other than its present limited sense in the time of Brooke, who quarrels with a case in the reign of E. 3, which he gives in his Abridgment, tit. *Idiot*, pl. 7. and questions the correctness of the report of it, because, to use his own words, *videtur esse potius de lunatico, quam de idiota.*‖

2. One made such by sickness, which my Lord Hale calls *dementia accidentalis vel adventitia*, and which he again distinguishes into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and though the party, in every thing else, be entitled to the same protection with an idiot, and though his disorder seem permanent and fixed, yet, as he had once reason and understanding, and as the law sees no impossibility but that he may be restored to them, it makes the king only a trustee for the benefit of such a one, without giving him any profit or interest in his estate.

Hale's Hist. P. C. 30.

3. A lunatic; this is also *dementia accidentalis vel adventitia*, and takes its name from the great influence which the moon has in all disorders of the brain (*d*); and though such a one hath intervals of reason, yet during his phrensy he is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent.

4 Co. 125; Co. Lit. 247; Hale's Hist. P. C. 31. β Jackson v. King, 4 Cowen, 207.*g* (*b*)‖ This notion of the influence of the moon hath been exploded by the sounder philosophy of modern times. Saint Owen indignantly rejects it as derogatory from the character and office of the empress of the night. "*Deus*," I cite the passage from Du Cange's Glossary, tit. *Lunaticus*, "*ad hoc lunam fecit, ut tempora designet, et noctium tenebras temperet, non ut alicujus opus impediat, aut dementem faciat hominem, sicut stulti putant, qui dæmonibus invasos a lunâ pati arbitrantur.*" All that is to be said in support of the notion will be found in an elegant Latin treatise, *De imperio solis ac lunæ in humana corpora, et morbis inde oriundis*, by the late Dr. Mead.‖

4. One made mad by drunkenness, which is called *dementia effectata*; and though, as hath been said, such a person be not entitled to the protection of the law, yet if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth

(B) How they are to be found such.

phrensy, this puts him in the same condition with any other phrensy, and equally excuseth him; also, if by one or more such practices an habitual or fixed phrensy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrensy thereby caused, puts the man in the same condition as if the same was contracted involuntarily at first.

Plow. 19 a.; Cromp. Just. 29 a.; Co. Lit. 247; Hale's Hist. P. C. 32. β When a person is intoxicated to such a degree as to deprive him of his ordinary reasoning faculties for a considerable time, it is *primâ facie* evidence that he is incapable of managing his affairs. Matter of Tracy, 1 Paige, 580.*g*

But, though this subject of madness may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein, in law, is between idiocy and lunacy; the first, a fatuity *a nativitate, vel dementia naturalis*, which excuseth the party as to his acts, and entitles the king to the receipt of the rents and profits of his estate during his life, without being obliged to render any account for the same: the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of lunacy, and (*a*) equally excuseth with idiocy, as to acts done during the phrensy. But herein they differ, that in the latter case the king, as hath been said, is only a trustee for the lunatic, and accountable to him, if he happens to be restored to his understanding, or to his representatives, if it happens otherwise. But in what things they further differ, will be seen by that which follows.

(*a*) 4 Co. 125 a.

(B) How they are to be found such.

EVERY person of the age of discretion is in law presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil as criminal cases.

Hale's Hist. P. C. 33; β Jackson v. King, 4 Cowen, 207; Jackson v. Van Dusen, 5 Johns. 144.*g*

The trial of idiocy, madness, or lunacy, in civil cases, and in order to the commitment or custody of the person and his estate, which belongs to the king, either to his own use and benefit, as in case of idiocy, or to the use of the party, in case of accidental madness or lunacy, is by writ or commission to the sheriff, or escheator, or particular commissioners, (*b*) both by their own inspection and by inquisition, to inquire and return their inquisition into the Chancery; and thereupon a grant or commitment of the party and his estate ensues: and in case the party, or his friends, find themselves injured by the finding him a lunatic or idiot, a special writ may issue to bring the party before the chancellor, or before the king, to be inspected; and if, on examination, it appear that the party is no (*c*) idiot, the whole commission and office shall be discharged without any traverse or *monstrans de droit*.

9 Co. 31 a; 4 Co. 126. And for this writ of *idiota inquirendo*, vide Fitz. N. B. 232, 3. (*b*) || These last seem to have entirely superseded any proceedings under the old writ *de idiota inquirendo*. But coming in the room of the writ, and being in the nature of it, the commissioners have all the powers which the sheriff or escheator had, and, among them, the power of summoning witnesses. *Ex parte* Lund, 6 Ves. 781. The commission, which is under the great seal, issues, not of course, but upon a petition stating the lunacy of the party, with an affidavit annexed to it of two or more persons in support of that fact. A creditor, a debtor, or even a stranger, may prefer the petition. *Ex parte* Ogle, 15 Ves. 112. In matter Prior, 1 Collins, 341; and if a clergyman becomes *non compos*, and the duties of the church are not performed by some other person, the

(B) How they are to be found such.

church-wardens may, *ex officio*, apply for a commission. In matter of Bell, 1 Collins, 377. But the granting the commission is discretionary in the chancellor, and does not necessarily follow upon the fact of lunacy being established. *Ex parte* Tomlinson, 1 Ves. & Beam. 57. β To justify the chancellor in issuing a commission, the mind of the individual must be so impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. Matter of Morgan, 7 Paige, 236; Matter of Mason, 3 Edw. 380. See Persse, *Ex parte*, 1 Moll. 219.*g* Though the property be abroad, unless it be in Ireland, in which case it is under the control of the great seal of that kingdom, (in the matter of the Duchess of Chandois, 1 Sch. & Lefr. 391,) or the supposed lunatic be abroad, yet a commission may issue; β Matter of Perkins, 2 Johns. Ch. R. 124; *g* but, as the authority under it is not in the commissioners only, but in the jury likewise, it cannot be executed out of this country; nor, except in very special circumstances, at any other place than the residence of the lunatic, and by a jury of the neighbourhood. β Castleman v. Castleman, 6 Dana, 55; Campbell's case, 2 Bland, 209.*g* Where the lunatic is abroad, the mansion-house is considered as his place of residence for this purpose; but, if he is in this country, the place in which he lived prior to his lunacy, not that into which he has been since carried; and if he be so situated, that he cannot be removed to the jury, and it is inconvenient for the jury to go to him, one or two of them (in analogy to what is done in civil cases) may examine him, and report their observations to the rest. *Ex parte* Southcot, Ambl. 109; 2 Ves. 401, S. C.; *Ex parte* Hall, 7 Ves. 261; *Ex parte* Smith, 1 Swanst. 4; *Ex parte* Baker, Coop. 205. β An inquisition of lunacy, it seems, may be good, although the person of the alleged lunatic is out of the jurisdiction of the court. O'Brien's case, 1 Ashm. 82.*g* The commissioners and jury have a right, without any order of the court for that purpose, to inspect the supposed lunatic, and to examine him, and he himself is also entitled to be present at the execution of the commission if he thinks proper. *Ex parte* Cranmer, 12 Ves. 455; β Matter of Tracy, 1 Paige, 580.*g* And the persons in whose custody he may be, refusing to produce him, are punishable as for a contempt. *Ex parte* Southcot, 2 Ves. 405; Ambl. 111. Should he die before office found, no inquisition can be taken. Beverley's case, 4 Co. 127 a. The proceedings on the commission are on the law side of the Court of Chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law. 3 Bl. Comm. 427. Where the fund has been too small to bear the expense of a commission, reference to the master in the first instance has been ordered, to see what is proper to be allowed the lunatic for maintenance. Machin v. Salkeld, 2 Dick. 634. β Farrow, *Ex parte*, 1 Russ. & My. 112.*g* And the court has gone so far, in consideration of the smallness of the fund, as upon petition accompanied with affidavits of the state of the petitioner's mind, and the amount of the property, to order, *without any reference to the master*, payment to be made of the dividends of the two next quarters with liberty to apply again, by a short petition, so that the state of the party's mind, and the amount of the property, might from time to time be known. Eyre v. Wake, 4 Ves. 795.‖ (*c*) Idiocy may be tried by inspection, because it may be discerned; but not lunacy, without taking out a commission. Skin. 5.

β On the execution of a commission in the nature of a writ *de lunatico inquirendo*, the sheriff who summoned the jury should not be in the room, nor converse with the jury while deliberating on their verdict.

Matter of Arnhout, 1 Paige, 497.

The sheriff and not the commissioner is the proper person to select the jurors in a case of a commission in the nature of a writ *de lunatico inquirendo*.

Matter of Wager, 6 Paige, 11.*g*

Also the party found an idiot or lunatic may traverse (*b*) the inquisition, as may any other person having a title to the land; and therefore it is said, that by the statutes 8 H. 6, c. 16, and 18 H. 6, c. 6, & 7, there ought to be a month's time between the return of the inquisition and the grant of the custody and the lands, in order for the parties to come in and tender such traverse.

Skin. 178. β No person is entitled to traverse an inquisition so as to reverse it, unless he be interested at the time of finding it. Armstrong v. Short, 1 Ruff. 11. See as to the right to traverse the inquisition. Matter of Folger, 4 Johns. Ch. R. 169; Matter of M'Lean, 6 Johns. Ch. R. 440; Den v. Clark, 5 Halst. 217.*g* (*a*) [This traverse is

(B) How they are to be found such.

given by st. 2 Edw. 6, c. 8, § 6, which provides, "that if any person shall be untruly founden lunatic or idiot, every person grieved by such office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial thereon, and have like remedy and advantages, as in other cases of traverse upon untrue inquisitions or office founden." Though the statute gives the right to traverse to all persons aggrieved by the inquisition, yet the heir cannot traverse it, but is bound upon the traverse by the lunatic or his alienee, who may either of them traverse it. *Ex parte* Roberts, 3 Atk. 312. β In New York it is not a matter of course, to allow an inquisition to be traversed. Matter of Tracy, 1 Paige, 580.*g* In the case of a lunatic, the traverse may be by attorney, but an idiot must traverse in person. 3 Atk. 7. However, if there be an application to traverse or supersede the commission, the lunatic must appear to be examined *coram rege in concilio*, which words have been considered to mean, the Court of Chancery. Ambl. 112; 3 Atk. 635. And in the mean time, till the point of lunacy is determined, the court will make a provisional order as to the lunatic's effects. 3 Atk. 635. It hath been doubted, notwithstanding the above statute, whether the party aggrieved by the inquisition must not apply to Chancery. Ley. 26, 27. ‖ Lord Thurlowe held it to be in the *discretion* of the chancellor to grant leave to any person *grieved*, &c., to traverse; and refused it to the alleged husband of the lunatic, circumstances having made the marriage doubtful. In matter of Fust, 1 Cox, 418.‖ β But the party found insane by inquisition is entitled as of right to traverse the inquisition. In re Neville, 1 Craw. & Dix. 54; Matter of Bridges, 1 Craig & Phil. 338.*g* [And it is certain that there must be an application, in order to suspend the grant of the custody of the person, which regularly is immediate upon the return of the inquest. There must be an application too for permission to traverse, which the court will not grant to a *second* inquisition clearly finding the party *non compos*, as it would spin out the proceedings to a very great length and infinite expense. *Ex parte* Barnesley, 3 Atk. 185.] ‖ But Lord Loughborough thought the traverse to the inquisition to be *de jure*, and not matter of favour; and therefore held himself bound to allow it, though not dissatisfied with the return. *Ex parte* Wragg, 5 Ves. 450; Id. 832, S. C. Yet a mere stranger, who has no interest, shall not, it seems, be permitted to traverse. *Ex parte* Ward, 6 Ves. 579. But a person, who has an interest under a contract with a lunatic, as an alienee, *Ex parte* Roberts, *ubi supra*, Br. *Idiot*, pl. 2, or who has contracted to sell property to him, *Ex parte* Morley, 9 Ves. 478, is entitled to traverse. *Ex parte* Hall, 7 Ves. 262. An improper attempt to traverse will be dismissed with costs. *Ex parte* Ward, *ubi supra*. The allowance of the traverse suspends all proceedings under the commission, and the taking possession of the property, so that the person suing out the commission, however meritorious, can be allowed no costs pending the traverse; Sherwood v. Sanderson, Coop. 108, nor at any time, if it terminate successfully; because there is no fund in court out of which to pay them. *Ex parte* Wragg, *ubi supra; Ex parte* Ferney, 5 Ves. 832; *Ex parte* Glover, 1 Meriv. 269. None of these inquisitions are conclusive; for the parties dissatisfied with them, may litigate the point again, either by bringing actions at law, or by bill in equity. *Ex parte* Barnesley, *ubi supra;* Faulder v. Silk, 1 Collins, 396; Hall v. Warren, 9 Ves. 605. The crown cannot traverse, and therefore is entitled to a *Melius inquirendum;* a writ to which the subject has no right. *Ex parte* Roberts, 3 Atk. 6; *Ex parte* Cranmer, 12 Ves. 454. The traverser of the inquisition is considered at the trial below in the light of a defendant opposing the title found for the crown, without setting up any title in himself. Upon such a traverse, therefore, the prosecutor of the commission has a right to make up the record, and carry it down to trial. R. v. Roberts, 2 Str. 1208.‖]

β In Pennsylvania, where a writ *de lunatico inquirendo* has been issued, and the return to the inquisition is that the party "by reason of old age and long continued sickness, has so far become deprived of reason and understanding, as to be wholly unable to manage his estate;" this is not a sufficient finding that he is "*non compos mentis*" within the constitution and laws of that state.

Beaumont's case, 1 Whart. 52. See Darling v. Bennett, 8 Mass. 29; Matter of Barker, 2 Johns. Ch. 232.*g*

If by inquisition a person be found a lunatic, and the custody granted to J S, and the party thus found bring a *scire facias* to set aside the inquisition, the committee of the lunatic cannot plead, nor join issue in such

scire facias ; for he can have no interest in the estate of the lunatic, being only in the nature of a bailiff to the king; and therefore his duty is to inform the king's attorney-general of the nature of the affair, who is the proper person to contest the matter in behalf of the king.

2 Sid. 124, Susan Thorn v. Coward. β The court may appoint a receiver of the estate of a lunatic before the return day of the inquisition, the inquest having found him a lunatic. *Ex parte* Kenton, 5 Binn. 631.*g*

‖ A commission of lunacy may be superseded, if the party is improperly or irregularly found *non compos.* It may also be superseded upon the recovery of the party's understanding. To authorize a supersession in this last case, Lord Thurlowe was of opinion (*a*), that derangement having been once clearly established, the party ought to be restored to as perfect a state of mind as he had before; which should be proved by evidence as clear and satisfactory. But Lord Eldon (*b*) seemed to think that an inferior degree of mind, such as is competent to common purposes, is sufficient. But his Lordship at the same time declared, that the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by the evidence of persons having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence.

Ex parte Roberts, 3 Atk. 6; *Ex parte* Stanley, 1 Ves. 25. β When the court is satisfied that substantial justice has been done, it will not set aside the proceedings in a case of much delicacy, although there has been some irregularity in the proceedings of the commissioners and the jury. Glen, *ex parte*, 4 Desaus. 546. But when the inquisition in lunacy found that the person was, and had been a lunatic from her infancy, the inquisition was set aside, and a new inquisition issued. Matter of Bruges, 1 My. & Craig, 278. The inquisition should distinctly state that the party who is the object of the inquisition is a *lunatic* or an *idiot*, or use an equivalent description, as finding him to be of *insane mind.* Armstrong v. Short, 1 Ruff. 11.*g* (*a*) Attorney-General v. Parnther, 3 Br. Ch. Rep. 444. (*b*) *Ex parte* Holyland, 11 Ves. 10.

On a petition by the lunatic and his two sisters, who were the committees of his person and estate, that the commission might be superseded, the inquisition quashed, and the bond vacated, the lunatic being recovered; lord chancellor, after examining the lunatic, who appeared in court, and expressed himself well satisfied with the conduct of his sisters and the account, made an order accordingly.

Ex parte Bumpton, Mosel. 78. β See *Ex parte* Drayton, 1 Desaus. 144; Matter of M'Lean, 6 Johns. Ch. R. 440; Matter of Hanks, 3 Johns. Ch. R. 567.*g*

But, where a lunatic, having recovered his reason, petitioned that the commission might be superseded, the court, as he had often relapsed, and had been found by the inquisition a lunatic with lucid intervals, made an order that he should have his full liberty, but that the cassetur of the inquisition, and the supersedeas of the commission, should be suspended for some time.

Ex parte Earl Ferrers, Mosel. 332.‖

As to idiocy, lunacy, or madness, which excuses in capital cases, it is not necessary that it be found by inquisition that the party was a madman, idiot, or lunatic, previous to the commitment of the fact; for if he was actually mad at the time of the fact committed, this shall excuse. And this, regularly, is to be tried by an inquest of office to be returned by the sheriff of the county wherein the court sits for the trial of the offence; and if it be found that he was actually mad, he shall be discharged without any other

trial; but, if they find that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute.

36 Ass. pl. 27; Bro. Cor. 101; And. 107, 154; Sav. 50, 57; Hawk. P. C. 2; Hale's Hist. P. C. 35. {1 Mass. T. Rep. 103.}

Also, in case a man in a phrensy happen by some oversight, or by means of the jailer, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is mad, the judge in discretion may discharge the jury of him, and remit him to jail to be tried after the recovery of his understanding, especially, in case any doubt appears upon the evidence touching the guilt of the fact, and this *in favorem vitæ*. And if there be no colour of evidence to prove him guilty; or, if there be a pregnant evidence to prove his insanity at the time of the fact committed; then, upon the same favour of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement.

Hale's Hist. P. C. 35. See Russ. on Crimes, bk, 1, c. 1, § 2.

So, if a person during his insanity commit a capital offence, and recover his understanding, and being indicted and arraigned for the same, plead not guilty, he ought to be acquitted; for, by reason of his incapacity, he cannot act *felleo animo*.(*a*)

Hale's Hist. P. C. 36. ‖ (*a*) The reason here assigned for immunity from punishment, that the party acts with no vicious will, is, I fear, false in fact. The true reason seems rather to be, that in the state or disposition of mind in which the party is, the penal provision must be inefficacious; the counter-motives which the law opposes to the commission of the act being at too great a distance to have the effect of influencing his conduct.‖

See the 6 G. 4, c. 23, leaving the time for traversing inquisitions, &c.

(C) Who hath an Interest in, and Jurisdiction over them: And herein of appointing them proper Curators and Committees, and the Power and Duty of such Committees.

It seems to be agreed at this day, that the king as *parens patriæ* hath the protection of all his subjects, and that, in a more peculiar manner, he is to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. This, in some books, is called a prerogative in the crown, and in others a *regium munus*, or duty which the king owes his subjects in return for their subjection and allegiance to him.(*b*)

Stanf. Prerog. c. 9, f. 33; 2 Inst. 14; 4 Co. 126 a; Dyer, 25. (*b*) [This branch of the prerogative is generally, but not necessarily, exercised by the person who has the custody of the great seal, to whom it is delegated by warrant under the sign manual, countersigned by the two secretaries of state. But the warrant confers no jurisdiction, only a power of administration; and if that power be abused, or any erroneous orders be made under it, as it is derived under the sign manual, the appeal is to the king in council. 2 Ves. jun. 72; 3 Atk. 635; 3 P. Wms. 104; 6 Br. P. C. 329; 2 Dick. 559. This power appears to have been exercised first in the Court of Chancery, and afterwards in the Court of Wards and Liveries; ‖ but, upon its falling back to the crown on the abolition of the latter court, it was again delegated to the person holding the great seal; and most properly; for after the custody is granted, the chancellor acts in matters relative to the lunatic, not under the sign manual, but by virtue of his general power as keeper of the king's conscience; all subsequent orders originate in the Court of Chancery itself, as the court from which the commission inquiring of the lunacy issues, and into which the inquisition is returned, and by which the grant founded on the inquisition is made. *Ex parte* Grimstone, Ambl. 706; In the matter of Fitzgerald, 2 Sch. & Lefr. 438.‖

My Lord Coke, in his 2 Inst., is of opinion, that by the common law the king had no prerogative in the custody of an idiot's lands, but that the same belonged to the lords of whom the lands were holden, and that the same

was given to the king by some act of parliament after the making of *magna charta*, and before the statute *de prærogativa regis*, 17 E. 2, c. 9. But in 4 Co., Beverley's case, he says, that this prerogative was by the common law, and that the statute *de prærogativa regis* is only declarative thereof.(*a*)

2 Inst. 14; 4 Co. 126. (*a*) [It is clear that the statute was not introductive of any new right of the crown; it was merely a parliamentary declaration of certain prerogatives, which by law resided in the king. But, whether the king had this prerogative by the common law, or by force of some non-existing statute, seems not so clear. Bracton makes no mention of it; but the author of Fleta tells us, that certain persons, called *tutores*, used to have the custody of the lands *idiotarum et stultorum;* and that this trust having been greatly abused, an act was made in the reign of Edw. 1, giving to the king the custody of the persons and inheritances *idiotarum et stultorum*, during their lives, if such *a nativitate;* with a reservation to the lord of all his lawful claims for wards, relief, and the like. Fleta, lib. 1, c. 11, § 10. Though, from the manner in which this writer expresses himself, it should seem, that this provision was confined merely to the case of natural fools; yet the very introductory words of the stat. of 17 Ed. 2, c. 10, "*habet providere,*" show a pre-existent right in the crown to the custody of the lands of lunatics.]

But however that may be, now, by the statute *de prærogativa regis*, or 17 E. 2, c. 9, it is enacted, "That the king (*b*) shall have the custody of the (*c*) lands of natural fools, taking the profits of them, without waste or destruction, and shall find them their necessaries of whose fee soever the lands be holden; and after their death he shall render the lands to the right heirs, so that such idiots shall not alien, nor their heirs be disinherited."

(*b*) || The words of the statute are, Rex *habet* custodiam.|| (*c*) And also of their goods and chattels. 4 Co. 148.

And c. 10, of the said statute, "Also the king (*d*) shall provide when any (that beforetime hath had his writ and memory) happen to fail of his writ, as there are some *per lucida intervalla*, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue, besides their sustentation, shall be kept to their use, to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened, and the king shall take nothing to his own use; and if the party die in such estate, then the residue shall be distributed for his soul, by the advice of the ordinary."

(*d*) || In the statute it is *habet providere.*||

§ The first and paramount rule in lunacy is to provide for the personal ease and comfort of the lunatic,(*e*) and the maintenance is not limited like that of an infant, to the income.(*g*)

(*e*) Weld v. Pew, 1 Beat. 268. (*g*) Matter of Perse, 3 Moll. 94; Matter of Salisbury, 3 Johns. Ch. R. 347.*g*

|| If a party be duly found a lunatic, and that finding be acquiesced in, committees of his person and estate are, by letters patent, appointed by the chancellor under the authority derived to him from the king's sign manual. But it is the practice (unless the estate is extremely small) to refer it to a master to approve of a proper person to act as committee. The same person is frequently appointed committee both of the person and estate. In the appointment, relations, unless there is some specific objection, are preferred to strangers. It is no objection in modern practice, though it was so formerly, that the committee of the person is entitled as heir at law, upon the death of the lunatic, to his real estate. That he is the next of kin to the lunatic, and may come in for a share of the personal property under the statute of distributions, has never been considered as

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an objection. But a master in Chancery, or solicitor under the commission, cannot, for obvious reasons, be appointed committee or receiver of the estate. Neither will the court allow the appointment of one as committee of the person, whom it finds engaged in a bargain to give part of the profits of the office to another. Where two persons equally akin to a feme lunatic, the one a man the other a woman, applied for the commitment of the person, the woman was preferred, as being of the same sex, and better knowing how to take care of her.

2 Mad. Pr. Eq. 580; 1 Collins, 194; *Ex parte* Le Heup. 18; Ves. 221; *Ex parte* Cockayne, 7 Ves. 591; Dormer's case, 2 P. Wms. 262; Neal's case, Id. 544; *Ex parte* Fletcher, 6 Ves. 427; *Ex parte* Pincke, 2 Meriv. 452; *Ex parte* Ludlow, 2 P. Wms. 638.

Where the custody of the estate was granted to husband and wife, the wife being next of kin to the lunatic, Lord Talbot held, that the husband's right was determined by the death of the wife, it being a joint grant, and a mere authority without any interest. Indeed it was not necessary to join the husband in the grant, for it had been holden by Lord Parker, in *Ex parte* Kingsmill, Mich. 1720, that a feme covert was capable of such a grant. It was said by Lord Chancellor King, that he had found by experience, that granting the commitment to two had been attended with inconveniencies, by occasioning suits, and putting the estate to great expense. However, such a grant is not unfrequent in practice, and in many cases highly necessary.

Ex parte Lyne, Ca. temp. Talb. 143; 2 P. Wms. 638; *Ex parte* Le Heup, 18 Ves. 221.

β The heir and next of kin of a person found a lunatic are of right entitled to propose themselves to the master for the charge of committee of the person.(*a*) When the lunatic has a son of full age, and in the country, against whom there appear to be no objections, it is almost of course to appoint him committee of the estate,(*b*) but he will be required to give security.(*c*)

(*a*) Matter of Persse, 1 Moll. 439. (*b*) Matter of Lord Bangor, 2 Moll. 518; Matter of Livingston, 1 Johns. Ch. 436. (*c*) Matter of Frank, 2 Russ. 450.

Persons whose situations admit of their frequently visiting the lunatic, and inspecting the management of his concerns, are to be preferred as committees.

Ex parte Fermor, Jac. 404.

The committee of a lunatic ought to be resident within the jurisdiction of the court.

Ex parte Ord, Jac. 94.

The committee of a habitual drunkard has a right to decide, subject to the superintendence of the court, where the drunkard shall reside.

Matter of Lynch, 5 Paige, 120.*g*

Where no one can be procured to act as a committee of the estate, a receiver may be appointed with a salary, upon giving such security to the attorney-general as a committee does. A receiver has been also appointed where the committee has resided at a distance from the estate, or been infirm, or it has not been thought expedient to intrust him with the property. And where the committee of the person and estate has been unable to give the required security, he has been restrained from receiving any part of the estate, and a receiver has been appointed. The security generally required is a bond by the committee and two sureties, approved by the attorney-general, in double the amount of the outstanding estate. The bond has,

under circumstances, been ordered to be delivered up, and a less or greater security taken. But this is an application not to be encouraged, as, if the lunatic recovers, he may be without remedy on a concealment.

Ex parte Warren, 10 Ves. 622; 1 Collins, 5, 9, 257. β See Matter of Hussey, 1 Moll. 226.*g* *Ex parte* Billinghurst, Ambl. 104; 1 Collins, 262; *Ex parte* Northlight, 2 Ves. 673; *Ex parte* Pereira, Id. 674.

β The committee of a lunatic is a mere commissioner of the court, acting under its control, and removable at its pleasure.

Bolling v. Turner, 6 Rand. 584.*g*

As the great seal has the power of appointing, so it can remove the committee if he misconducts himself, or becomes bankrupt. But bankruptcy is of itself no reason for taking from him the custody of the person.

Lloyd v. ——, 2 Dick. 460; *Ex parte* Jones, 13 Ves. 237; *Ex parte* Mildmay, 3 Ves. 2.‖

The distinction, established by the statute of E. 2, between the king's interest in the lands of an idiot and those of a lunatic, is laid down and admitted in all the(*a*) books which speak of this matter; and on this foundation it hath been(*b*) resolved, that the king may grant the custody of an (*c*) idiot and his lands to a person, his heirs and executors, and that he had the same interest in such a one as he had in his ward by the common law.

(*a*) Bro. *Idiot*, 4, 5; Dyer, 25; Moor, 4; And. 23; 4 Co. 127; Co. Lit. 247. (*b*) 3 Mod. 43, 44; Skin. 5, 177; 2 Show. 171; Vern. 9. Prodgers and Lady Frazier. (*c*) But the king cannot grant the custody of the body and lands of a lunatic to one, to take the profits to his own use. Moor, 4, France's case adjudged. [Though the king or great seal cannot grant a lunatic's estate without account, yet they may allow as great a salary for the maintenance of the lunatic, as the income of the estate amounts to. Sheldon v. Fortesque Aland, 3 P. Wms. 110.] ‖ In like manner, though the court will not directly allow the committee any thing for his care and trouble, yet it will do it indirectly by increasing the allowance for maintenance. But such an application by a committee who is a near relation, the son, of the lunatic, bound in duty to the trust, is considered as very ungracious. In the matter of Annesley, Ambl. 78.‖ β In the United States an allowance is generally made to the committee for his care and trouble. Matter of Roberts, 3 Johns. Ch. 43; Matter of Carter, 3 Paige, 146; Bulows v. Committee of O'Neall, 4 Desaus. 394.*g*

But, though a lunatic is by commission to be under the care of the public, and the lord chancellor is to appoint a committee for him whose acts are subject to the control and correction of the Court of Chancery; yet such a one, whether so appointed, or whether he of his own head take upon him the care and management of the estate of a lunatic, is but in nature of a bailiff or trustee for him, and accountable (*d*) to him, his executors or administrators.

4 Co. 127; 2 Chan. Ca. 239. ‖ In the matter of Fitzgerald, 2 Sch. & Lefr. 439. (*d*) If he disobeys an order to pass his accounts, he is punishable as for a contempt. Mad. Eq. Pr. 584. And the attorney-general will file a bill against him on behalf of the lunatic, for an account of and to secure the lunatic's property. Attorney-general v. Panther, 2 Dick. 748. If he has not passed his accounts regularly according to his recognisance, and he is required by the general order of 15th December, 1792, he will not be allowed his costs. Mad. Pr. Eq. 583; *Ex parte* Clarke, 1 Ves. jun. 296. Nor is he permitted to pass his accounts without referring them to the master to see what sums he has had in his hands from time to time; and if he is found to have kept money in his hands unnecessarily, he must pay interest for it. *Ex parte* Hilliard, 1 Ves. jun. 90; *Ex parte* Catton, Id. 156. Notice also should be given to the next of kin to attend at the passing of the accounts; who are allowed to go in, not by virtue of any right they can claim in respect to their contingent possibilities, so much as for the protection of the court, and to assist the court in watching over the interests of the lunatic. But, unless the decree provides for it, a defendant, who is made party to the suit merely in

respect of an annuity under a will, will not be allowed to attend, or to be paid the costs in respect of past attendanees; nor indeed are the next of kin to be allowed the costs of their attendanee, unless some special case be laid before the eourt. *Ex parte* Wright, 2 Ves. 25; Tharp v. Tharp, 3 Meriv. 510; *Ex parte* Whitbread, 2 Meriv. 101.‖

And as the committees of a lunatic have no interest, but an estate during pleasure, it hath been ruled, that they cannot make leases, nor any ways encumber the lunatic's estate, without a special order from the Court of Chancery, where the profits are not sufficient to maintain the lunatic.*

Vern. 262, Foster v. Merchant. *The committee of a lunatic cannot make a lease of the lunatic's lands at law. Knipe v. Palmer, 2 Wils. 130. [Nor ean he present to a vacant benefice. The right of presentation belongs to the great seal, and was first asserted by Lord Talbot. 1 Wooddes. 409.] β The eourt will not sanetion the granting of building leases of part of a lunatic's estate, for 999 years. Matter of Starkie, 2 Russ. 197.*g* ‖ As to leases, whether for lives, or for term of years determinable upon lives, or for a term of years absolute, it is provided by 11 Geo. 3, e. 20, that the guardian or committee of a lunatic's estate may, in his name, by the direction of the great seal signified by an order made upon hearing all parties concerned, upon petition, in a summary way, accept a surrender of such leases, and execute new leases of the premises therein comprised; the fines and money received on such renewals (after deducting all necessary incident charges and expenses) to be paid to the guardian or committee, and applied for the benefit of the lunatic, in such manner as the great seal shall direct; and upon the death of the lunatic, the whole, or so much of such money as shall be unapplied, to be considered, as between the representatives of his real and personal estate, as real estate, unless he shall be tenant for life only, and then as personal estate. By 43 Geo. 3, e. 75, § 3, where a lunatic, having only a limited interest in freehold or copyhold lands, has a power of granting leases and taking fines, reserving small rents, this power may be exeeuted by the committee of the estate under the direction of the great seal of the United Kingdom and of Ireland respectively, according as the inquisition may be taken in England or Ireland. And by § 4, where the lunatic is entitled to freehold or copyhold estates in fee or in tail, and an absolute interest in leasehold estates, of which it may be for his benefit that leases or under leases should be made, the committee of the estate may, by the order of the great seal, make such leases thereof according to the lunatic's interest therein, and to the nature of the tenure of such estates respectively, for such terms, and subject to such rents and covenants, as the great seal shall direct. By 29 G. 2, e. 31, the guardian or committee may, under the direction of the great seal, surrender leases in order to obtain renewals for the benefit of the lunatic; such renewed leases being to the same uses as those surrendered were.‖

Also where a lunatic, before he became such, made a mortgage of good part of his estate for 50*l.* and the committee transferred this mortgage, and took up 3 or 400*l.* more upon; it was holden by my lord keeper, that the mortgage should stand as a security for the 50*l.* only.

Vern. 262.

And as to improvements and buildings on the lunatic's estate it has been holden, that upon his death the heir must be let into the estate without making any allowance for such improvements.(*a*)

Vern. 263. (*a*) ‖ Though money laid out in improvements has sometimes been allowed; 2 Ves. jun. 75, note; Sergeson v. Sealy, 2 Atk. 413; yet the committee acts in such eases at his peril, unless he has previously obtained an order of the court. Anon. 10 Ves. 104; *Ex parte* Marton, and *Ex parte* Hilbert, 11 Ves. 397.‖ [But the committees of the real estate of a lunatic may exercise the same power over it in regard to eutting timber for repairs, as any discreet person who was the absolute owner of the soil might do. *Ex parte* Ludlow, 2 Atk. 407.] {6 Ves. jun. 428, *Ex parte* Tabbert. Expenditures on it without a previous application to the eourt will not be allowed. 10 Ves. jun. 104, Anonymous; 11 Ves. jun. 397, *Ex parte* Marton and *Ex parte* Hilbert; Ib. 563, Attorney-general v. Vigor.}

The committees of a lunatic having invested part of the lunatic's personal estate in a purchase of lands, made in the lunatic's name to him and his heirs, the question was whether the committees had not exceeded their

power by changing the personal estate into a real estate, and thereby defeating the next of kin, in favour of the heirs at law; and after great debate, and upon reading the statutes made touching the granting of the custody of the lunatic, whereby it is provided, that the surplus shall be safely kept and delivered to him, if he recover; if not, upon his death to be employed for the benefit of his soul, &c., the court decreed an account of the personal estate, and the lands purchased to be sold, and the money to go to and be divided as personal estate, among the next of kin.(*a*)

2 Vern. 192; Awdley v. Awdley, 1 Dick. 16, S. C.; Eq. Ca. Abr. 277, S. C. (*a*) ‖ The decree declared, "that it was not in the power of any committee to alter the nature of a lunatic's estate." But it does not appear that the decree ordered the lands to be sold; the plaintiff was to have his share paid so far as there was personal estate to pay, and the purchased lands were to stand charged with the remainder. Reg. Lib. 1690, A. fol. 69.‖

[It is a rule, stated indeed by Lord Hardwicke to be never departed from, not to vary or change the property of a lunatic, so as to effect any alteration as to the succession to it. But Lord Apsley, C., decreed (*b*) encumbrances paid off in the lifetime of the lunatic out of savings of the estate, to be assigned to attend the inheritance, and not in trust for the next of kin, the ruling principle in the management of a lunatic's estate being, the doing that which is most beneficial to the lunatic. Hence the court will order part of the lunatic's personal estate to be laid out in repairs, (*c*) or even upon improvements of his real estate, if the interest of the lunatic requires it, and the next of kin cannot show good cause against it. So, if the interest of the lunatic requires it, (*d*) the court will order timber upon his estate to be cut and sold, and the produce of it will go to his personal representatives. The immediate interest of the lunatic is the only object which the court attends to; the eventual interests of the succession are not regarded: there is no equity as between mere, absolute, real, and personal representatives; they must take the property as they find it; and therefore (*e*) a charge upon the estate falling in to the lunatic as the representative of the person for whose benefit the charge was made, shall sink for the benefit of the heir.

Ex parte Marchioness of Annandale, Ambl. 81;] *β* Weld v. Pew, 1 Beat. 268; Matter of Starkie, 2 Russ. 197; In re Badcock, 4 My. & Craig, 440.*g* (*b*) *Ex parte* Grimstone, Id. 706. (*c*) Sergeson v. Sealey, 2 Atk. 414. (*d*) *Ex parte* Bromfield, 3 Br. Ch. Rep. 510; Lord Compton v. Lord Oxenden, 4 Br. Ch. Rep. 231; 2 Ves. jun. 69. (*e*) 4 Br. Ch. Rep. 397; 2 Ves. jun. 261; *Ex parte* Baker, 6 Ves. 8.

‖The next of kin are not considered as having any interest whatever in the lunatic's property. "When the court is called upon to make an allowance," says Lord Eldon (*g*), "it has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, and never regarding the interests of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter, are otherwise unprovided for, the court, looking at what it is likely the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So, where a large property devolves upon an elder son, who is a lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former, upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So also, where the father of a family

becomes a lunatic, the court does not look at the mere legal demands, which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burden on the parish; but considering what the lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the court does not do this, because, if the lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the lunatic. The court does nothing wantonly or unnecessarily to alter his property, but, on the contrary, takes care for his sake, that if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time, in such manner as the court thinks it would have been wise and provident in the lunatic himself to apply it, in case he had been capable." Acting, therefore, upon this principle, that the court will not refuse to do for the benefit of the lunatic's family, that which it is probable the lunatic himself would have done, it has not confined the allowance to such relations only as he would be bound to provide for, but has extended it to brothers, and other collateral kindred, reserving to its own discretion the amount and proportions of such allowance.

Smith v. Attorney-general, cited in 6 Ves. 260. (*g*) *Ex parte* Whitbread, 2 Meriv. 102.

The Court of Chancery will not permit any part of the lunatic's estate to be laid out on private security.

Ex parte Cathorpe, 1 Cox, 182.‖

Also, the care and management of all affairs relating to idiots and lunatics is so peculiarly under the power and direction of the Court of Chancery, that all abuses in relation to them, as taking them out of the custody of their committees, marrying them, &c.,(*a*) are punishable as contempts to that court.

Pr. Ch. 208; Abr. Eq. 278. β It is a contempt of court to interfere with the property of a lunatic, after the person so interfering has been informed of the institution of proceedings to declare his incompetency. L'Amoureux v. Crosby, 2 Paige, 422; Matter of Holmes, 4 Russ. 186. See as to the power of the Court of Chancery to manage the estate of a person *non compos*, the following cases. Matter of Heller, 3 Paige, 199; Matter of Starkie, 1 Russ. 476; S. C. 2 Russ. 197; Matter of Ball, 2 Moll. 145; Barnewell, *Ex parte*, 1 Moll. 4; Matter of Salisbury, 3 Johns. Ch. R. 347; *Ex parte* Town, Turn. & Russ. 137; *Ex parte* Ellice, Jac. 234; Matter of Crompton, 5 Russ. 152.*g* (*a*) [Or not producing them, when required.] Lord Wenman's case, 1 P. Wms. 701; *Ex parte* Ludlow, 2 P. Wms. 638. {Or not delivering them to the committee according to the order of the court. 12 Ves. J. 445, 456, *Ex parte* Cranmer.}

[Although the guardianship of the king may be said to be determined by the death of the lunatic, yet it hath been holden, that the chancellor may make an order in the lunatic's affairs after his death, upon a report made, or petition presented in his lifetime.

Ex parte Grimstone, Ambl. 706; *Ex parte* Armstrong, 3 Br. Ch. Rep. 238; *Ex parte* M'Dougal, 12 Ves. 384.]

‖ Where a person agreed, in the lifetime of a lunatic, to be bound by a traverse, and upon the lunatic's death refused to be bound by it, an attachment was granted against him.

Ex parte Roberts, 2 Atk. 308.

The committee, it is clear, remains under the control of the court after the death of the lunatic.

In the matter of Fitzgerald, a lunatic, 2 Sch. & Lefr. 432.

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The assets of a lunatic, after his death, are distributable only by bill. The committee cannot have a reference on motion to ascertain the next of kin, that the money in his hands may be distributed; such a reference can be made only on bill filed.

Wigg v. Tyler, 2 Dick. 552; *Ex parte* Gilbert, 1 Ball and Beam. 297.] β After the death of the lunatic, his personal representatives, by petition to the chancellor, sitting in lunacy, cannot obtain from the committee of the person an account of his expenditures of the allowance for maintenance. Grosvenor v. Drax, 2 Knapp, 82.β

But it seemeth, that the statute of E. 2, which giveth the wardship of idiots' lands to the king, he finding them convenient maintenance out of the profits thereof, extends not to copyhold lands, for the prejudice that would thereby ensue to the lord; but yet all alienations made by an idiot of his copyhold lands after office found, shall be avoided by the king.

4 Co. 126 b; Co. Copyhold, 1562.

And yet it hath been holden, that though the king cannot have the custody of an idiot or lunatic copyholder, by reason of the prejudice that might accrue to the lord thereby, that yet the lord of a manor *de communi jure* hath not the custody of a lunatic's lands, but that there must be a custom to warrant it.

Cox v. Dawson, Noy, 27; Hob. 215, S. C. *per* Hobart; Lutw. 373.

But it hath been resolved, that the lord shall have the custody of one that is *mutus et surdus*, without alleging any custom for it. And the reason given why the lord shall have the custody is, because otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom, as where there is; and if the custody of one that is *mutus et surdus* of common right belongs to the lord, by the same reason of one that is a lunatic.

Eavers v. Skinner, Cro. Ja. 105.

‖ The king is not vested with the custody of a right of entry or action descending to an idiot.

Finch's Law, 95; 1 H. 7, 24; 29 E. 3, 436.

The property of a lunatic can only be vested in government securities; except under special circumstances.

Ex parte Ellier, Jac. R. 234; and see 18 Ves. 285; 4 Madd. 191.

A committee of a lunatic neglecting to pass his accounts may be charged with interest on petition by a creditor.

Ex parte Hall, Jac. R. 160.

Where there are sufficient funds, a liberal application of the property of a lunatic ought to be made, in order to afford him every comfort his situation will admit.

Ex parte Baker, 6 Ves. 8; and see 1 Ves. jun. 296.

The committee shall not have any allowance for his care and trouble.

10 Ves. 103.

Where no one can be found to act as committee, a receiver is appointed with a salary, but to be considered, and to give security as committee.

Ex parte Warren, 10 Ves. 622; *Ex parte* Radcliffe, 1 Jac. & W. 639.

The committee will not be removed merely because he has become bankrupt, whether he has or has not obtained his certificate; but the court will direct an inquiry whether the comfort of the lunatic has been sufficiently provided for with reference to the funds allowed.

Ex parte Proctor, 1 Swanst. 531.‖

(C) Who hath an Interest in them.

And though the king, as hath been said, has the sole direction and management of idiots, &c., yet a private person may confine a friend who is mad, and bind and beat him, &c., in such manner as is proper in such circumstances.

2 Roll. Abr. 546.

Also, by the 17 G. 2, c. 5, § 20, reciting, that there are sometimes persons, who, by lunacy or otherwise, are furiously mad, or so far disordered in their senses, that they may be dangerous to be permitted to go abroad, it is therefore enacted, "That it shall and may be lawful for any two or more justices of the peace where such lunatic, or mad person, shall be found, by warrant under their hands and seals, directed to the constables, churchwardens, and overseers of the poor of the parish, town, or place, or some of them, to cause such person to be apprehended and kept safely locked up in such secure place, within the county or precinct where such parish, town, or place shall lie, as such justices shall under their hands and seals, direct and appoint; and (if such justices find it necessary) to be there chained, if the last legal (*a*) settlement of such person shall be in any parish, town, or place within such county or precinct; and if such settlement shall not be there, then such person shall be sent to the place of his or her last legal settlement by a pass, as vagrants by this act are directed to be sent, and shall be locked up or chained, by warrant of two justices of the county or precinct, to which such person is so sent in manner aforesaid; and the reasonable charges of keeping, removing, maintaining, and curing such person during such restraint, (which shall be for and during such time only as such lunacy or madness shall continue,) shall be satisfied and paid (such charges being first proved on oath) by order of two or more justices of the peace, directing the churchwardens or overseers where any goods, chattels, lands, or tenements of such person shall be, to seize and sell so much of the goods and chattels, or receive so much of the annual rents of the lands and tenements as is necessary to pay the same, and to account for what is so seized, sold, or received to the next quarter sessions; but if such person hath not an estate to pay and satisfy the same over and above what shall be sufficient to maintain his or her family, then such charges shall be satisfied and paid by the parish, town, or place, to which such person belongs, by order of two justices, directed to the churchwardens or overseers for that purpose."

(*a*) An idiot gains a settlement like any other poor child, and the father ought to maintain him; but, if he cannot, the parish or place where he is settled. Hard's case, 2 Salk. 427.

"Provided that this act, or anything contained therein, shall not extend, or be construed to extend to restrain or abridge the prerogative of the king, or the power and authority of the lord chancellor, lord keeper, or commissioners of the great seal for the time being, or of the chancellor or vice-chancellor of the county palatine of Lancaster for the time being, or of the chamberlain or vice-chamberlain of the county palatine of Chester for the time being, touching or concerning such lunatics, or to restrain or prevent any friend or relation of such lunatics from taking them under their own care and protection."

‖ Private mad-houses are required to be licensed, and are otherwise regulated, by stat. 14 Geo. 3, c. 49, continued by stat. 19 Geo. 3, c. 15, and made perpetual by stat. 26 G. 3, c. 91. See the acts of 48 Geo. 3, c. 96; 55 Geo. 3, c. 46; 59 Geo. 3, c. 127, which provide for the better care and maintenance of lunatics being paupers or criminals in England.‖

(D) How far their Want of Understanding shall be said to be prejudicial to them in Civil Respects.

An idiot or person *non compos*, may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property.

Co. Lit. 2, 8.

Also an idiot, or person of *non sane* memory, may purchase, because it is intended for their benefit; and if after recovery of their memory they agree thereto, they cannot avoid it; but, if they die during their lunacy, their heirs may avoid it, for they shall not be subject to the contracts of persons who wanted capacity to contract. So, if after their memory recovered, the lunatic, or person *non compos*, die without agreement to the purchase, their heirs may avoid it.

Co. Lit. 2; 2 Vent. 203. ‖ *Qu.* then, whether he may not appoint a gamekeeper on his manor.‖

If an idiot or lunatic marry, and die, his wife shall be endowed; for this works no forfeiture at all, and the king has only the custody of the inheritance in the one case, and a power of providing for him and his family in the other; but in both cases the freehold and inheritance is in the idiot or lunatic. And therefore (*a*) if lands descend to an idiot or lunatic after marriage, and the king, on office found, takes those lands into his custody, or grants them over to another, as committee, in the usual manner; yet this seems no reason why the husband should not be tenant by the curtesy, or the wife endowed, since their title does not begin to any purpose till the death of the husband or wife, when the king's title is at an end.

Co. Lit. 31 a; 4 Co. 124, 125. *β* The marriage of a *non compos mentis* is void to all intents and purposes. Middleborough v. Rochester, 12 Mass. 365. But such marriage ought to be declared to be void by the decision of a competent tribunal. Wightman v. Wightman, 4 Johns. Ch. 343.*g* (*a*) Yet vide Plowd. 263 b; Vern. 10.

A lunatic shall be tenant by the curtesy, and shall have dower. So, though a woman, being a lunatic, kill her husband, or any other, yet she shall be endowed, because this cannot be felony in her, who was deprived of her understanding by the act of God.

Perk. 365.

If a person *non compos* be disseised, and a descent cast, this, it is said, takes away his entry, but not the entry of his heir; for regularly, the *non compos* in this case cannot allege the disability in himself, because he cannot be supposed conscious of it. Nor is he allowed ever, at any time, to allege it; for when he is once *non compos*, there is no certain time when he can be adjudged to recover that disability, unless where he is legally committed, and then the acts during his lunacy will be set aside and discharged, and afterwards the commission superseded; for in no other way can the *non compos* be legally restored to his right, and to his capacity of acting.

Lit. § 405; Co. Lit. 247.

A person *non compos*, being lord of a copyhold manor, may make grants of copyhold estates; for such estates do not take their perfection from any power or interest in the lord, but from the custom of the manor, by which they have been demised and demisable time out of mind.

4 Co. 23 b; Co. Copyhold, 79, 107.

Idiots and lunatics are both by the civil law, and likewise by the common law, incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity, and want of understanding, they

are incapable of determining, whether they will take upon them the execution of the trust, or not.

Godolph. Orph. Leg. 86.

Therefore it hath been agreed, that if an executor become *non compos*, that the spiritual court may, on account of his natural disability, commit administration to another.

Salk. 36.

An idiot, or person *non compos*, being robbed, shall be (*a*) bound by a sale of his goods in a market-overt.

2 Inst. 713. (*a*) Not bound by a fine and non-claim, vide tit. *Fines and Recoveries*, and 2 Inst. 516.——Cannot bring an appeal of the death of his ancestor. 2 Hawk. P. C. c. 23, § 32.

|| If a defendant become insane after an arrest at law, it is now settled, that this is no reason for discharging him out of custody, upon filing common bail. Nor will the court interpose, though he be insane at the time of the arrest, and a commission of lunacy (*b*) has actually issued against him. And a lunatic (*c*) has been brought up by *habeas corpus* from St. Luke's Hospital, and surrendered in court in discharge of his bail.

Kernot v. Norman, 2 T. R. 390; Ibberson v. Lord Galway, 6 T. R. 132; Mott v. Verney, 4 T. R. 121. (*b*) Steel v. Alan, 2 Bos. & Pull. 362. (*c*) Pillop v. Sexton, 3 Bos. & Pull. 550.

But the court of C. P. have refused to compel security for costs in error on the ground of the plaintiff in error being a lunatic, and a commission having issued against him since the commencement of the suit.

Steel v. Alan, 2 Bos. & Pull. 437.

As a commission of lunacy will not protect the lunatic against an action, so it will be no defence against a commission of bankrupt, for that is a species of action.

Anon. 13 Ves. 590.||

βA lunatic who has been restored to reason may make a will, although the decree, declaring him to be a lunatic, may remain in force.

Stone v. Damon, 12 Mass. 488.

A person deaf and dumb, *ex nativitate*, may have sufficient understanding to make a deed.

Brown v. Brown, 3 Conn. 290. See Brower v. Fisher, 4 Johns. Ch. R. 441.*g*

(E) How far the Want of Understanding will excuse in criminal Cases.

It is laid down as a general rule, that idiots and lunatics, being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever.

Hawk. P. C. 2.

And therefore a person, who (*d*) loses his memory by sickness, infirmity, or accident, and kills himself, is not a *felo de se*.

3 Inst. 54. (*d*) But, if a lunatic in a lucid interval kills himself, he is a *felo de se*. Hal. Hist. P. C. 412.

So, if a man gives himself a mortal stroke while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se;* for though the death complete the homicide, the act must be that which makes the offence.

Hal. Hist. P. C. 412.

But it is not (*e*) every melancholy or hypochondriacal distemper that

denominates a man *non compos*, for there are few who commit this offence but are under such infirmities; but it must be such an alienation of mind as renders them to be madmen, or frantic, or destitute of the use of reason.

Hal. Hist. P. C. 412. ‖ See the case of Earl Ferrers, 19 How. St. Tr. 947. Arnold's case, 16 How. St. Tr. 764; Bellingham's case, Collins, Addend. 636.‖ (*e*) In 3 Mod. 100, it is said to be the prevailing opinion, that a person who kills himself must be *non compos* of course; on this supposition, that it is impossible a man in his senses should do a thing so repugnant to reason and nature. But in Hawk. P. C. c. 27, § 3, this notion is exploded. And so in Comb. 2, 3.

And as a person *non compos* cannot be a *felo de se* by killing himself; so neither can he be guilty of homicide in killing another, nor of petit treason. Also, if one who has committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed.

Hal. Hist. P. C. 30; Hawk. P. C. 2; vide *supra*, letter (B).

It seems to have been (*a*) anciently holden, in respect of that high regard which the law has for the safety of the king's person, that a madman might be punished as a traitor for killing or offering to kill the king; but this is now (*b*) contradicted by better and later opinions.

(*a*) Fitz. Coron. 351; Regist. 309; 4 Co. 124 b; 2 Roll. Rep. 324. (*b*) 3 Inst. 46; Co. Lit. 247; H. P. C. 10, 43; Hawk. P. C. 2, and herewith my Lord Hale seems to agree, Hal. Hist. P. C. 36, 37. For he says, that the reason is the same between homicide and treason, and that he that cannot act *felonicè*, or *animo felonico*, cannot act *proditoriè*.——But as this exception laid down by my Lord Coke, 4 Co. 124, though contradicted by himself, 3 Inst. 6, tends so much to the safety of the king's person, he is not willing to question it. See Hadfield's case, Collins, 483.

The great difficulty in these cases, is to determine where a person shall be said to be so far deprived of his sense and memory, as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions, which my Lord Hale distinguishes between, and calls by the names of total and partial insanity; and though it be difficult to define the invisible line that divides perfect and partial insanity, yet, says he, it must rest upon circumstances, duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defect of human nature, or on the other side too great an indulgence given to great crimes; and the best measure he can think of is this: Such a person, as labouring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.

Hal. Hist. P. C. 30. β Vide Esquirol, Maladies Mentales, *passim*; 1 Beck's Med. Jur. 534; Coop. Med. Jur. 66; Chit. Med. Jur. 342; Traill, Med. Jur. 51; Ray, Med. Jur. § 183; Ryan, Med. Jur. 279; Prichard on Insanity, 11; Broussais on Insanity, 190; Trebuchet, Jur. de la Méd. 55; Briand, Méd. Lég. tome i. p. 528; Dict. des Sciences Méd., articles *Alienation, Demence, Folie, Hallucination, Manie.*γ

It hath been already observed, that he who is guilty of any crime whatsoever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober.

Vide *supra*, (B).

Also, he who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself.

Keil. 53; Dalt. c. 95; Hawk. P. C. 2.

And here we must observe a difference the law makes between civil

suits that are terminated *in compensationem damni illati*, and criminal suits, or prosecutions, that are *ad pœnam et in vindictum criminis commissi;* and therefore it is clearly agreed, that if one who wants discretion commits a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage.

2 Roll. Abr. 547; Hob. 134; Co. Lit. 247; Hawk. P. C. 2; Hal. Hist. P. C. 15, 16, 38.

‖ But though insanity excuses from the guilt of criminal actions, yet it highly imports the public safety that the offender shall not be suffered to go at large; it is therefore enacted by st. 39 & 40 Geo. 3, c. 35, "That in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in such strict custody, in such place and in such manner as to the court shall seem fit, until his majesty's pleasure shall be known; and it shall thereupon be lawful for his majesty to give such order for the safe custody of such person, during his pleasure, in such place and in such manner as to his majesty shall seem fit; and in all cases where any person, before the passing of this act, has been acquitted of any such offences on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order of the court before whom such person has been tried, and still remains in custody, it shall be lawful for his majesty to give the like order for the safe custody of such person, during his pleasure, as his majesty is hereby enabled to give in the cases of persons who shall hereafter be acquitted on the ground of insanity.

§ 2. "And if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury, lawfully empannelled for that purpose, so that such person cannot be tried upon such indictment, or if upon the trial of any person so indicted such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until his majesty's pleasure shall be known; and if any person charged with any offence shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be empannelled to try the sanity of such person; and if the jury so empannelled shall find such person to be insane, it shall be lawful for such court to order such person to be kept in strict custody in such place and in such manner as to such court shall seem fit, until his majesty's pleasure shall be known; and in all cases of insanity so found, it shall be lawful for his majesty to give such order for the safe custody of such person so found to be insane, during his pleasure, in such place and in such manner as to his majesty shall seem fit."

By § 3. "For the better prevention of crimes being committed by persons insane, it is further enacted, That if any person shall be discovered and apprehended under circumstances that denote a derangement of mind,

and a purpose of committing some crime, for which, if committed, such person would be liable to be indicted, and any of his majesty's justices of the peace, before whom such person may be brought, shall think fit to issue a warrant for committing him or her as a dangerous person suspected to be insane, such cause of commitment being plainly expressed in the warrant, the person so committed shall not be bailed except by two justices of the peace, one whereof shall be the justice who has issued such warrant, or by the court of general quarter sessions, or by one of the judges of his majesty's courts in Westminster Hall, or by the lord chancellor, lord keeper, or commissioners of the great seal."

By § 4, reciting that insane persons had, at different times, endeavoured to gain admittance to his majesty's presence, by intrusion on his majesty's palaces and places of residence and otherwise, and his majesty's person may be endangered by reason of the insanity of such persons, it is enacted, "That if any person who shall appear to be insane shall endeavour to gain admittance to his majesty's presence, by intrusion on any of his majesty's palaces or places of residence, or otherwise, so that there may be reason to apprehend that his majesty's person may be endangered, it shall be lawful for his majesty's privy counsel, or one of his majesty's principal secretaries of state, to cause such person to be brought before them or him; and if upon examination it shall appear that there is reason to apprehend such person to be insane, and that the person of his majesty may be endangered by reason of the insanity of such person, it shall be lawful for his majesty's privy council, or one of his majesty's principal secretaries of state, to order such person to be kept in safe custody in such place, and in such manner, as according to circumstances shall be ascertained; and for such purpose, it shall be lawful for the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of Great Britain, to award a commission under the said great seal, directed to certain commissioners to be therein named, to inquire into the sanity of such person, and whether the person of his majesty may be endangered by reason of the insanity of such person, and for such purpose, to direct the sheriff of the county where such person shall be, to summon a jury to try the sanity of such person, and whether his majesty's person may be endangered by reason of the insanity of such person, in the same manner as juries are summoned to try the sanity of persons on a commission in the nature of a writ *de lunatico inquirendo;* and if, upon the inquisition so taken, it shall be found that such person is so far insane that the person of his majesty may be endangered by reason of the insanity of such person, it shall be lawful for the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal for the time being, to take order for the safe custody of such person so long as there shall be reason to apprehend that the person of his majesty may be endangered by reason of the insanity of such person; and if it shall afterwards appear that such person shall have recovered the use of his or her reason, so that there shall be no longer any reason to apprehend any danger to his majesty's person from the insanity of such person, it shall be lawful for the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal for the time being, to inquire into the fact by such means as to him or them shall seem proper; and if it shall appear to his or their satisfaction, that such person has so far recovered the use of his or her reason, that there is no ground for apprehending any danger to his majesty's person from the insanity of such person, it shall be lawful for the said lord chan-

cellor, lord keeper, and lords commissioners respectively, to direct such person to be discharged from custody, either absolutely or conditionally, or under restrictions, as to him or them shall seem meet."

By 56 Geo. 3, c. 117, reciting that "it is expedient that provision should be made for the due care of persons who may, after conviction for any criminal offence, become insane, it is therefore enacted, That if any person having been duly convicted of any offence, who after such conviction, and during his or her imprisonment or continuance in any jail, prison, hulk, penitentiary house, or house of correction, under sentence of transportation or imprisonment, shall become insane, and shall be duly certified by two physicians or surgeons that such person is insane, it shall be lawful for one of his majesty's principal secretaries of state to direct, by warrant under his hand, that such person as aforesaid shall be removed to such lunatic asylum or other proper receptacle for insane persons in the United Kingdom, as his majesty's said principal secretary of state may judge proper and appoint: and every such person so removed as aforesaid shall remain under confinement in such lunatic asylum or other proper receptacle as aforesaid, or in any other lunatic asylum or other proper receptacle, to which such person may be removed by any like order, until it shall be duly certified to his majesty's said principal secretary of state, by two physicians or surgeons, that such person has become of sound mind; whereupon his majesty's said secretary of state is hereby authorized, if such person shall still remain subject to imprisonment or to be continued in custody, to issue his warrant to the keeper or other person having the care of any such lunatic asylum or other proper receptacle as aforesaid, directing that such person shall be removed back from such lunatic asylum or other proper receptacle, to the jail, prison, hulk, penitentiary house, or house of correction, from whence the said person or persons shall have been taken, for the purposes of being confined in such lunatic asylum or other proper receptacle as aforesaid during the time of their being insane; or, if the period of imprisonment or custody of such person had expired, that such person shall be discharged."‖

(F) How far their Acts are good, void, or voidable: And of the late Provisions by Statute Law.

HERE we must first distinguish between acts done by idiots and lunatics *in pais*, and in a court of record; that as to those solemnly acknowledged in a court of record,(*a*) fines and recoveries, and the uses declared on them, they are good, and can neither be avoided by themselves nor their representatives; for it is to be presumed, that had they been under these disabilities, the judges would not have admitted them to make these acknowledgments.

4 Co. 124; 2 And. 145; Co. Lit. 247. (*a*) A purchase at a great undervalue by deed, fine, and recovery, obtained from a lunatic, but previous to his being found such, said to be set aside in Chancery. 2 Vern. 678. [A court of equity is indeed reported in one case to have relieved a remainder-man against a fine levied by an idiot, even against a purchaser. Tothil's Transactions, 42. That it would relieve in this case in the same manner as it relieves against fines levied in the case of fraud, Mr. Fonblanque thinks is inferrable from the argument in Day v. Hungat, 1 Ro. Rep. 115; Eq. Tr. 48.] *β* Fines cannot be avoided at common law for the cognisor's insanity, but a court of equity will relieve, when there is fraud. Milner v. Turner, 4 Monr. 244.*g*

Therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs; for though the judges ought not to admit of a

fine from a madman under that disability, yet when it is once received it shall never be reversed, because, the record and judgment of the court being the highest evidence that can be, the law presumes the conusor at that time capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it.

4 Co. 124; 2 Inst. 483; Bro. tit. *Fines*, 75; Co. Lit. 247; 12 Co. 123. β The acknowledgment of a letter of attorney in court by a lunatic, may be likened to the acknowledgment of a fine in England. Milner v. Turner, 4 Monr. 244.*g*

So, in case of a fine levied by an idiot, it shall stand against him and his heirs; for no averment of idiocy can vacate the fine; nor will an office, finding him an idiot *a nativitate*, be sufficient to reverse the fine, for that were to lessen the credit of judgments in courts of record, by trying them by other rules than themselves.

2 And. 193; 4 Co. 124.

As to acts done by them *in pais*, they are distinguished into void and voidable, though as to themselves they are regularly unavoidable, because no man is allowed to disable himself, for the insecurity that may arise in contracts from counterfeit madness and folly. Besides, if the excuse were real, it would be repugnant that the party should know or remember what he did. But the heirs and executors may avoid such acts *in pais* by pleading the disability; for there is no such repugnancy in their pleading it.

Beverley's case, 4 Co. 124; Stroud v. Marshal, Cro. El. 398, *semb. contr.* And so 2 Bl. Comm. 291; Yates v. Boen, 2 Str. 1104; Bro. tit. *Fait*, 62, F. N. B. 202. ‖ And by Wilmot, J. "It does seem to be very unaccountable, that a man should be at liberty to avoid his own acts by the duress of man, and not by the duress of Heaven. And the reason given for it in the books, that a man cannot know what he did when he was mad, is to me quite unintelligible; for what inconsistency is there in saying, he does not know he ever did such an act; but if he did, he was mad when he did it? The best and the truest reason seems to be, that the law has directed a particular mode of inquiry for the manifestation of insanity, and avoiding the acts of persons under that unhappy visitation. The king, as the general curator of all such persons, is to take them under his immediate protection, and after an office, finding the insanity, to avoid such of their acts as he thinks proper." See Wilm. Opin. and Judgm. 155.‖ β In the United States, the rule that a man shall not be permitted to stultify himself, seems to have been exploded, and he may in general avoid his acts, except those of record and those for necessaries and services rendered, by the allegation and proof of his insanity at the time they were entered into. 5 Whart. 371, 379; 2 Kent, Com. 451; 3 Day, 90; 3 Conn. 203; 5 Pick. 431; 5 Johns. 503. See Jenkins v. Jenkins, 3 Monr. 328; Colgate, D. Owings' case, 1 Bland, 376.*g*

The feoffment of an idiot, or *non compos*, is not void, but voidable; but it cannot be avoided by himself by entry, &c., and the reason hereof given in some books is, as before observed, because no man by law is permitted to disable himself. The better reason in this case seems to be, that anciently these feoffments were made not only for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants in military service, or in tillage, and so were presumed to be equally for the benefit of the lord and tenant, and therefore they were not holden to be void in themselves. And though an infant, at the age of discretion, defined by the law, may avoid them, and choose which is most for his benefit; yet, as to a person of *non sane memory*, there being no time defined when he recovers his senses, he cannot avoid such acts of his own by any subsequent act of his. But the king, who is the universal curator of all madmen, may, by writ *de idiota inquirendo* avoid such alienation, on office found; for the office, being of equal or greater solemnity than the feoffment, gives notice

to all men in whom the freehold is vested; and after such office, if the commission of lunacy be discharged, the lunatic is restored to his lands, because the king is the proper person to judge whether such alienations are for the benefit of the lunatic, or at what time he is to be looked upon to be restored to his senses. Also, the heir may avoid such alienations by entry or writ of *dum fuit non compos*, for the reasons before given. But the fine or recovery of a lunatic cannot be avoided, because they are acts of record, and the judges are supposed to take care that no such alienations be allowed; and if they be, there is no way of rectifying the error by a matter of equal notoriety.

4 Co. 123; Show. P. C. 152; Carth. 211, 435; Ld. Raym. 313; 3 Mod. 301; 2 Salk. 427, 576; Show. 296; Com. Rep. 45; Comb. 438, 468; 12 Mod. 174. β See Brackenridge v. Ormsby, 1 J. J. Marsh. 245.*g*

But though the king, or heir, may avoid the feoffment of a *non compos*, yet, if such a one be, by inquisition, found an idiot *a nativitate*, or a lunatic from such a time, though the inquisition hath relation to the nativity, or time of his becoming a lunatic, so as to avoid mesne acts, yet it shall not have relation to these times to entitle the king to the mesne profits, for these the tenant is entitled to in consideration of the services which he is obliged to do to those of whom the land is holden; (*a*) also, the king's title must appear by matter of record, which cannot be before the inquisition found.

Lev. 25, 26; 8 Co. 170, Tourson's case. (*a*) Vide Plowd. 488 b.

Also, such heirs and representatives, as can take advantage of the voidable acts of those they represent, must be privies in blood, as heirs are, or by representation, as executors; but privies in estate, as those in remainder or reversion, or by tenure, as the lord by escheat, cannot take advantage of the disability of him who made the feoffment.

4 Co. 124. β Privies in blood and in representation may avoid the voidable deeds of lunatics, but privies in law and estate cannot. Breckenridge v. Ormsby, 1 J. J. Marsh. 245. See Cates v. Woodson, 2 Dana, 454; Lazell v. Pinnick, 1 Tyl. 247.*g*

But the release, surrender, letter of attorney to give livery, warranty, or any other deed or writing obligatory, though they regularly at law, as hath been said, bind the *non compos*, are mere nullities with respect to others, and differ from a feoffment, which is a matter of great solemnity, being anciently transacted *coram paribus curtis*, who signed their attestation to the same, which, it is presumed, they would not have done, had the indiscretion been apparent.

2 Roll. Abr. 728; 4 Co. 124, 125. β Imbecility of mind, not amounting to lunacy or idiocy, in the grantor of land, is not sufficient to avoid his deed, when there is no fraud in obtaining it. Odell v. Buck, 21 Wend. 142.*g*

Therefore, where a person *non compos* being tenant for life, with remainder to his first and other sons, remainder over, did before the birth of any son surrender to him in remainder, with an intent to destroy the contingent remainders, and died, leaving issue a son; in this case it was holden, 1st, That the surrender was void *ab initio*, and not barely voidable; for had it been voidable only, yet, if at any time it had been effectual to merge the estate for life, before the birth of a son, it could not have been revived again by any act *ex post facto*. 2dly, that the surrender being void *ab initio*, the son, though he did not claim as heir, but by way of remainder, may take advantage of it. And this resolution seems agreeable to the strictest rules of reason and law; for if the surrender

had been allowed good or voidable only, it would have been prejudicial to all his sons after born, who were strangers, and third persons, and there could no use be made of the surrender but to do them mischief, which the acts of a madman ought not to be allowed to do, when, by a reasonable construction, it is in the power of the court to help them. And in this case a difference was taken between a feoffment and livery made *propriis manibus* of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c., which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in the law; and therefore the feoffment is not merely void, but voidable; but surrenders,(*a*) grants, &c., by an idiot are void *ab initio*.

Carth. 435; 2 Salk. 427, 576; Show. P. C. 152, 3; 3 Mod. 301; Comb. 468; 3 Lev. 284, S. C.; Thompson v. Leach, adjudged in B. R. and affirmed in the House of Lords. (*a*) Therefore if a man of *non sane* memory, being seised of a carve of land, grant a rent issuing out of the same land in fee, and die, and his heir enter, and the grantee distrain for the rent behind, the heir shall have an action of trespass; but, if the grantee had distrained in the life of the grantor for the rent behind, the grantor should not have an action of trespass; for he cannot avoid his deed by disabling himself. Perk. § 21.

β Imbecility of mind in the grantor of land, not amounting to idiocy or lunacy, is not sufficient to avoid his deed, when there is no fraud.

Odell v. Buck, 21 Wend. 142. See 4 Cowen, 207.*g*

If an idiot or lunatic enter into a recognisance, or acknowledge a statute, neither they themselves, nor their heirs, nor executors, can avoid them; for these are securities of a higher nature than specialties and obligations, which yet they themselves cannot avoid, and being matters of record, and equivalent to judgments of the superior courts, neither they themselves, their heirs nor executors, can avoid them.

4 Co. 124 a; 10 Co. 42 b; 2 Inst. 483; Bro. *Fait, Inrol.* 14. β All contracts made by lunatics after inquisition found are actually void. L'Amoureux v. Crosby, 2 Paige, 422.*g*

β Although at common law, a fine cannot be avoided, on the ground of lunacy or idiocy, authorities are not wanting to show that even fines have been relieved against in equity.

Milner v. Tanner's heirs, 4 Monr. 244; 2 Vern. 307, 678; 1 Fonbl. Eq. 52, note k. See Sherley v. Sherren, 1 Perr. & Dav. 126.*g*

If parceners of *non sane memory* make partition, unless it be equal, it shall only bind the parties themselves, but not their issue. And the reason it binds the parties themselves is the same for which all other contracts bind them, viz., because no man is admitted to stultify himself. And the reason their issue may avoid such partition is the same likewise for which they may avoid all other contracts made by such ancestors during their insanity, viz., because they may be admitted to show the incapacity of their ancestors, and so avoid all acts done by them during that time.

Co. Lit. 166 a. β The feoffment and livery of a lunatic are not void but voidable. Desilver's Estate, 5 Rawle, 111; *g* 4 Co. 125.

And although, as hath been observed, according to the strict rules of law no person is allowed to stultify himself, yet it seems that even at law the contracts of idiots and lunatics, after office found, and the party legally committed, are void, and it must be at the peril of him who deals with such a one; and that if afterwards the commission of lunacy be superseded

(F) How far their Acts are good, &c.

or discharged, the *non compos* shall be restored to his legal right: but this, it seems, must be at the suit and application of his committee.

Also, there are frequent instances in equity, where not only idiots and lunatics, who come within the protection of the law, but also persons of weak understandings have been relieved, when they appeared to have been imposed upon in their dealings; and unreasonable purchases, and securities obtained from them, have been set aside in their favour.

But for this vide Chan. Ca. 113, 153; Vern. 155; 2 Vern. 189, 414, 678, and vide tit. *Agreements*.

A bill was brought by a lunatic and his committee, to set aside a settlement which had been obtained from him by the defendant, before the issuing out of the commission of lunacy, but subsequent to the time wherein by the commission he was found to have been a lunatic; and the bill charged several acts of insanity and distraction previous to the making of the settlement, and the issuing out of the commission; and charged likewise, that the commission of lunacy was still in force. To this bill the defendants demurred, for that it was against a known maxim in law, that any person should be admitted to stultify himself; because during the continuance of the lunacy, he cannot be supposed to know what he did. But my lord chancellor overruled the demurrer, and said that rule was to be understood of acts done by the lunatic to the prejudice of others, that he should not be admitted to excuse himself on pretence of lunacy, but not as to acts done by him to the prejudice of himself. Besides, here, the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatic; and it has been always holden, that the defendant must answer in that case. And so he was ordered to do here, though the settlement was not unreasonable in itself, being only to limit the estate in question to the defendants, the uncles, in case of failure of issue male of the lunatic, with power for the lunatic to charge the same with considerable portions for his three daughters, with a power of revocation.

Abr. Eq. 279, Ridler v. Ridler.

β In Louisiana, in order to annul a conveyance on the ground of insanity, when the conveyance was made before interdiction, not only insanity, but the notoriety of the fact must be shown,(*a*) or it must be shown that the party contracting could not possibly be ignorant of the state of mind of the insane man.(*b*)

(*a*) Laloire v. Lacoste, 4 Lo. R. 115. (*b*) Louisiana Bank v. Dubreuil, 5 Mart. R. 425.

The institution of an action to establish the insanity of a person, although not decided before his death, authorizes the introduction of testimony to prove that at the time he executed the mortgage sued upon, he was notoriously insane.

Knox v. Haslett, 12 Mart. 255. See 11 Mart. R. 557.

In assumpsit for use and occupation of a house, the defendant being a lunatic, and, at the time, provided with a sufficient residence, held, that if the plaintiff knew that the defendant was insane, and took advantage of it to induce her to enter into the contract, he could not recover.

Dane v. Lady Kirkwall, 8 C. & P. 679. *g*

Idiots and lunatics, during their lunacy, are incapable of making (*c*) any will or testament; as are also persons grown childish by reason of extreme old age: so, one actually drunk, if he be so drunk as to have lost the

use of his reason: but, though a person who wants understanding cannot make a will, yet the rule herein is not to be taken from his not being able to measure an ell of cloth, tell twenty, or the like; but whether he have sense enough to dispose of his estate (*d*) with understanding.

Swinb. 71; Godolph. Orph. Leg. 25. (*c*) The statute of 32 H. 8, c. 1, gives a power to dispose of lands by will, except infants, idiots, feme coverts, and persons of *non sane* memory. (*d*) That it is sufficient that he be able to answer to familiar and usual questions. Cro. Ja. 497; 6 Co. 23 a.

But every person making a will is presumed to be of sound understanding, until the contrary be proved; so that the *onus probandi* lies on the other side: if the testator used to have fits and lucid intervals, and it cannot appear whether the will be made in the one or the other time, it shall be presumed to be made in the lucid intervals, if there be no argument of folly in the will; nay, though the testator had no lucid intervals, yet if it cannot be proved that he was mad at the time of making the will, it shall be presumed there was an intermission of madness at the time of making the will, if the will be a sensible, orderly will; but the least word of folly in such a will will overthrow it: on the other hand, if one be a very idiot, and make a good sensible will, yet the will shall not stand.

Swinb. 72; Godolph. 25; Dyer, 203; 8 Co. 147. [For the rules of determining what shall be considered a lucid interval, where previous lunacy hath been proved or admitted, see Attorney-General v. Panther, Fonbl. Eq. Tr. 65 n. x. 3 Br. Ch. Rep. 441. See also White v. Wilson, 13 Ves. 88; Cartwright v. Cartwright, 1 Phillim. 100.] β 2 Evans's Poth. on Obl. 668, 669; 1 Rep. Const. Ct. 225; 1 Pet. R. 163; 1 Lit. 102; Shelf. on Lun. 70; Male's Elem. of Forensic Medicine, 227; Willis on Mental Derangement, 151; Bouv. L. D. h. t. *g*

If a person of sound memory makes his will, and afterwards becomes *non compos*, this is no revocation of the will; yet (*a*) a bill will not lie in the lifetime of the *non compos*, to establish the testimony of the witness *in perpetuam rei memoriam* to such a will.

Godolph. 26; 4 Co. 61 b; (*a*) Vern. 105.

βThe authority of an agent may be revoked by the lunacy of the principal, but in that case the lunacy must be established by the inquisition. The mere existence of the lunacy, *per se*, does not operate as a revocation of the power.

Wallis v. The President and Directors of the Manhattan Co., 2 Hall, 495. *g*

‖By stat. 15 G. 2, c. 30, it is enacted, "That in case any person who now is, or at any time hereafter shall be, found a lunatic by any inquisition, taken or to be taken by virtue of a commission under the great seal of Great Britain, or any lunatic or person under a phrensy, whose person and estate by virtue of any act of parliament now are or hereafter shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the lord high chancellor of Great Britain, the lord keeper, or the lords commissioners of the great seal of Great Britain for the time being, or such trustees as aforesaid, or the major part of them respectively; every such marriage shall be, and is hereby declared to be, null and void to all intents and purposes whatsoever."

It would seem, however, that the marriage ought to be declared void by a sentence of the ecclesiastical court.

Ex parte Turing, 1 Ves. and Bea. 140. βWightman v. Wightman, 4 Johns. Ch. 343; Middleborough v. Rochester, 12 Mass, 365. *g* A person marrying a *non compos*, the custody of whom has been consigned to a committee, is guilty of a contempt of court, Ash's case, Pr. Ch. 203; Eq. Ca. Abr. 278, S. C., and accessaries to the mar-

riage would, it seems, be ordered to attend the court, and on refusal committed. Stuart v. Taylor, 9 Mod. 98; 2 Eq. Ca. Abr. 584, S. C.‖

[Courts of equity will not only sustain contracts completed by the lunatic whilst sane; but, under some circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy: "for the charge of the condition of a person entering into an agreement, by becoming lunatic, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy; as, if the legal estate be vested in trustees, a court of equity ought to decree a performance; but, if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity and leave it at law." Owen v. Davis, 1 Ves. 82, Fonbl. Eq. Tr. 46.]

‖ As the chancellor had no authority on a petition in lunacy, to order part of the lunatic's estate to be sold for the payment of his debts, to prevent a bill by creditors, it is enacted by stat. 43 G. 3, c. 75, "That it shall and may be lawful for the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of the United Kingdom, and of Ireland respectively, being intrusted, by virtue of the king's sign manual, with the care and commitment of the custody of the persons and estates of persons found lunatic or of unsound mind, and incapable of managing their affairs, by inquisition taken in England and Ireland respectively, to order the freehold and leasehold estates of such persons respectively, to be sold, or charged and encumbered by way of mortgage or otherwise, as shall be deemed most expedient, for the purpose of raising such sum or sums of money as shall be necessary for payment of the debts, and for performing the contracts or engagements of any such persons respectively, and the costs and charges attending the same, and attending such sale, mortgage, or encumbrance respectively, and to direct the committee or committees of the estate of such persons respectively, to execute in the name and on behalf of such persons respectively conveyances of the estates so to be sold, mortgaged, or encumbered, and to procure such admittance to, and make such surrenders of the copyhold estates of such persons found lunatic or of unsound mind, and to do all such acts as shall be necessary to effectuate the same, in such manner as such chancellor, keeper, or commissioners of the great seal of the United Kingdom and of Ireland respectively shall direct; which conveyances so to be made in pursuance of any such order as aforesaid, shall be as good and effectual in law as if the same had been executed by every such person so found lunatic or of unsound mind respectively, when in his or her sound mind." *Ex parte* Smith, 5 Ves. 556; *Ex parte* Dikes, 8 Ves. 79.

And by § 2. "In case there shall be any surplus of money to be raised by any such sale as aforesaid, after answering the purposes aforesaid, the same shall be applied and disposed of in the same manner as the estate sold would have been applied if this act had not been made."

By stat. 59 G. 3, c. 80, § 2, the powers and provisions of the above act, in this respect, are extended to estates holden by ancient demesne, or by copy of court roll.

By 36 G. 3, c. 90, § 3, reciting that "Commissions in the nature of a writ *de lunatico inquirendo* have frequently issued, and persons have thereupon been found lunatics, having certain parts of the stocks and annuities transferable at the bank of England, standing in the names of such lunatics in their own right, and the committees of the estates of such

lunatics having like parts of such stocks and annuities standing in their own names in trust for or as part of the property of such lunatics, have sometimes died intestate, or gone to reside beyond the seas, or have themselves become lunatics, or it has been uncertain and unknown whether they were living or dead; and that it is sometimes proper and expedient that such parts of the property of such lunatics as aforesaid should be transferred, but by the laws in being no valid or effectual transfer thereof can be made, whereby great inconveniences have arisen; it is enacted, that in all cases whatsoever where any such stock or annuities transferable or thereafter to be made transferable at the Bank of England, is, are, or shall be standing in the name or names of such lunatic or lunatics, in his, her, or their own right, or in the name or names of the committee or committees of his, her, or their estate or estates, in trust for the said lunatic or lunatics, or as part of his, her, or their property, it shall and may be lawful to and for the lord chancellor, lord keeper, or commissioners of the great seal of Great Britain for the time being, to order the accountant-general, secretary, or deputy secretary, for the time being, of the governor and company of the Bank of England, to transfer such stock or annuities to or into the name of any new committee or committees, or otherwise, and also to receive and pay over the dividends thereof, as the said lord chancellor, lord keeper, or commissioners of the great seal of Great Britain for the time being, shall direct; and that such transfers and payments shall be valid and effectual to all intents and purposes whatsoever."

The act is limited to the case of stock standing in the name of the lunatic himself, or his committee; and does not extend to stock standing in the name of another, to which the lunatic is entitled as administrator. *Ex parte* Adams, 2 Meriv. 112; *Ex parte* Hastings, 14 Ves. 182.

Notwithstanding the control given to the chancellor by this statute over money in the funds, it will not be applied in payment of the lunatic's debts, unless it be necessary for his accommodation.‖

By the 4 G. 2, c. 10, it is enacted, "That it shall and may be lawful to and for any person or persons, being idiot, lunatic, or *non compos mentis*, or for the committee or committees of such person or persons, in his, her, or their name or names, by the direction of the lord chancellor of Great Britain, or the lord keeper, or commissioners of the great seal of Great Britain for the time being, signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such person or persons, being idiot, lunatic, or *non compos mentis*, shall be seised or possessed in trust, or of the mortgagor or mortgagors, or of the person or persons entitled to the moneys secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons, being idiot, lunatic, or *non compos mentis*, is or are, or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the lord chancellor, &c., shall by such order so to be obtained direct, to any other person or persons; and such conveyance or assurance, so to be had and made as aforesaid, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said person or persons, being idiot, lunatic, or *non compos mentis*, was or were, at the time of making such conveyance or assurance, of *sane* mind, memory, and understanding, and not idiot, lunatic, or *non compos mentis* or had by him, her, or themselves executed the same; any law, &c."

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And it is further enacted, "That all and every such person and persons being idiot, lunatic, or *non compos mentis*, and only trustee or trustees, mortgagee or mortgagees as aforesaid, or the committee or committees of all and every such person and persons being idiot, lunatic, or *non compos mentis*, and only such trustee or mortgagee as aforesaid, shall and may be empowered and compelled, by such order so as aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances, as aforesaid, in like manner as trustees or mortgagees of *sane* memory are compellable to convey, surrender or assign, their trust-estates or mortgages."

‖ It would seem that the chancellor can make no order under this act, unless a commission of lunacy has been taken out, the words of the act being, that "all persons being lunatic, or the committee of such persons shall convey." But, where the party was abroad, and had been found a lunatic by a competent jurisdiction in the country where he resided, and a curator of his person and estate had been regularly appointed, he was considered as a lunatic within the act.

Ex parte Otto Lewis, 1 Ves. 298; *Ex parte* Marchioness of Annandale, Ambl. 80; *Ex parte* Gillam, 2 Ves. jun. 587. See Sylva v. Da Costa, 8 Ves. 316.

A trustee within this act must be without interest and without duties. Under a trust, therefore, to sell for the payment of debts, if the trustee be a creditor, he is not within it; for he has an interest.

Ex parte Tutin, 3 Ves. & Beam. 150.

By 36 G. 3, c. 90, it is enacted, That when trustees of stock, or the personal representatives of such persons deceased shall be absent out of the jurisdiction, or not amenable to the process of the Courts of Chancery and Exchequer, or bankrupts, or *lunatics*, or shall refuse to transfer the stock, or to receive and pay over the dividends to the persons beneficially entitled, or it shall be uncertain or unknown whether they are living or dead, it shall be lawful for the said courts respectively in any cause depending, to order that the accountant-general, or secretary, or deputy secretary of the governor and company of the Bank of England do transfer the said stock into the name of the accountant-general of the Court of Chancery, or of the deputy remembrancer of the Court of Exchequer, in trust in such cause, or otherwise into the names of the persons equitably or beneficially entitled, as the case may require, and as to the said courts shall seem fit; and also to order, that the said accountant-general, secretary, and deputy secretary of the bank, do pay over the dividends of such stock as the said courts shall direct. And where one or more, but not all, of the trustees fall under any of the descriptions above mentioned, the said courts may order those who are forthcoming, and ready and qualified to act, to transfer the stock, and pay over the dividends, as the said courts shall direct.

℘ This act is repealed by the 6 G. 4, c. 74, except as to proceedings already commenced. ℘

It would seem not to be necessary, in order to obtain relief under this act, that the lunacy should be found by inquisition. In a case where no commission had been taken out, the court made the order on the defendant's *refusal* to transfer; the refusal proceeding from mere weakness of mind.

Sims v. Naylor, 4 Ves. 360.

A lunatic abroad under a judicial proceeding in the country where he resides, in the nature of a commission of lunacy, is not within this clause of the act.

Sylva v. Da Costa, 8 Ves. 316.

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Where the heir of one who has covenanted to surrender copyholds is a lunatic, the surrender cannot be made under the statute 4 G. 2, c. 10.

Ex parte Currie, 1 Jac. & W. 642.

By the 6 G. 4, c. 74, the last-mentioned act is repealed, and also the 36 G. 3, c. 90, except as to proceedings already commenced.

6 G. 4, c. 74.

"§ 3. And be it further enacted, that when and so often as any person or persons seised or possessed of any lands, tenements, or hereditaments or other property, or any estate or interest therein, upon any trust or trusts, or by way of mortgage, shall be idiot, lunatic, or of unsound mind, it shall be lawful for the committee or committees of such person or persons, or any person or persons to be appointed as herein-after is mentioned, in the name or names of such person or persons being idiot, lunatic, or of unsound mind, by the direction of the lord chancellor of Great Britain or the lord keeper or commissioners of the great seal of Great Britain, being intrusted by virtue of the king's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind, to convey, release, surrender, assign, or otherwise assure such lands, tenements, hereditaments, or property, or estate on (*sic*) interest to such person or persons, and in such manner as the lord chancellor, lord keeper, or commissioners of the great seal of Great Britain intrusted as aforesaid respectively shall think proper and direct; and every such conveyance, release, surrender, assignment, or assurance shall be as valid and effectual to all intents and purposes, as if the person or persons being idiot, lunatic, or of unsound mind, had been at the time of the execution thereof of sane mind, memory, and understanding, and had by himself, herself, or themselves executed the same."

6 G. 4, c. 74, § 3. It was decided on the 4 G. 2, c. 10, that the costs of a lunatic trustee conveying under the statute, must be borne by the *cestui que trusts*. *Ex parte* Pearse, 1 Turner & Russ. R. 325. A petition that the committee may be ordered to transfer property vested in the lunatic as trustee, may be entitled in the lunacy, and need not be entitled "in the matter of the act," &c. 6 G. 4, c. 74. *In re* Fowler, 2 Russ. R. 449.

§ 4. "And be it further enacted, that when and so often as the person or persons seised or possessed as aforesaid being idiot, lunatic, or of unsound mind, shall not have been found such by inquisition, it shall be lawful for the said (*sic*) chancellor, lord keeper, or commissioners of the great seal of Great Britain intrusted as aforesaid, to order or appoint such person or persons as to the said lord chancellor, lord keeper, or commissioners shall seem meet on behalf of the person or persons being idiot, lunatic, or of unsound mind, (but not having been found such by inquisition,) to convey, release, surrender, assign, or otherwise assure such lands, tenements, hereditaments, or property, or estate, or interest as herein-before is mentioned.

"§ 5. And be it further enacted, that when and so often as any person or persons seised or possessed of any lands, tenements, or hereditaments, or other property, or any estate or interest therein upon any trust or trusts, or by way of mortgage, shall be out of the jurisdiction of or not amenable to the process of Court of Chancery or Exchequer, or it shall be unknown or uncertain whether he, she, or they be living or dead, or such person or persons shall refuse to convey or otherwise assure such lands, tenements, hereditaments, or property, or estate or interest to the person or persons entitled thereto, or as he, she, or they shall direct, or to a new trustee or trustees

duly appointed by virtue of some power or authority, or by the Court of Chancery or Exchequer, either alone or together with any continuing trustee or trustees as occasion shall require; then and in every or any such case it shall be lawful for the Court of Chancery or Exchequer to appoint such person or persons as to such court shall seem meet, on behalf and in the name or names of the person or persons seised or possessed as aforesaid, to convey, surrender, release, assign, or otherwise assure the said lands, tenements, hereditaments, or property, or estate or interest to such person or persons, and in such manner as the said court shall think proper and direct; and every such conveyance, release, surrender, assignment, or assurance shall be as valid and effectual to all intents and purposes, as if the person or persons being out of the jurisdiction or not amenable to the process of the said courts, or not known to be alive, or having refused, had by himself, herself, or themselves executed the same.

"§ 9. And be it further enacted, that all and every person and persons being an infant or infants, and all and every person and persons being idiot, lunatic, or of unsound mind, or the committee or committees of any such person or persons, and all and every the person and persons who shall be appointed by virtue of this act, shall and may be empowered and compelled by the order to be obtained as herein-before is mentioned, to make such conveyance or conveyances, or other assurance or assurances, or transfer or transfers, payment or payments as aforesaid, in like manner as trustees of full age and of sane mind, memory, and understanding, are compellable to convey, or otherwise assure or transfer and pay over, their trust estates or funds.

"§ 10. And be it further enacted, that the several provisions hereinbefore contained shall extend and be construed to extend to cases in which a trustee or trustees may have some beneficial estate or interest in the lands, tenements, hereditaments, property, stocks, funds, annuities, or securities vested in him, her, or them as aforesaid, and also to cases in which the trustee or trustees may have some duty or duties to perform so as to enable conveyances and other conveyances (*sic*) and transfers to be made in order to vest any lands, tenements, hereditaments, property, stock, funds, annuities, or securities in a new trustee or trustees duly appointed in place of such trustee or trustees by virtue of some power or authority, or by the Court of Chancery or Exchequer, either alone or jointly with any continuing trustee or trustees, as the case may require.

"§ 11. And be it further enacted, that the provisions hereinbefore contained shall extend and be construed to extend to all cases of petitions in which the Court of Chancery, or the lord chancellor, lord keeper, or commissioners of the great seal of Great Britain, or the master of the Rolls, or the vice-chancellor of England, or the Court of Exchequer are by law authorized and empowered to grant relief and make summary orders without suit, either in matters of charity, or relative to or for the better security, or for the application, receipt, payment, or transfer of any of the funds thereof, or in matters relative to any benefit or friendly societies, or for the better security, or for the application, receipt, payment, or transfer of any of the funds thereof."

By 1 W. 4, c. 65, most of the statutes relating to idiots and lunatics are repealed.

The 6 G. 4, c. 74, is repealed, so far as it relates to stocks, funds, and

securities belonging beneficially to persons being infants, idiots, lunatics, or of unsound mind, (except as to proceedings previously commenced.)

By 1 W. 4, c. 65, § 3, where any person being under twenty-one, or being a feme covert or lunatic, is entitled by descent or surrender to the use of a last will, or otherwise, to be admitted tenant of any copyhold lands, such person in his or her own proper person, or being a feme covert by her attorney, or being an infant by guardian or attorney, or being a lunatic by his committee, shall come to and appear at one of the three next courts kept for the manor, whereof such land shall be parcel, and shall there offer himself or herself to the lord or steward to be admitted tenant, to make which appearance and to take which admittance in behalf of such infant, lunatic, or feme covert, such guardian, committee, or attorney is hereby authorized and required.

Although much of this act relates to infants and femes covert, yet it is thought best to print it at large in this place, and it is referred to under the other heads.

By § 4, it shall be lawful for any feme covert or for any infant who has no guardian, by writing under hand and seal, to appoint an attorney on her or his behalf for the purpose of appearing and taking such admittance as aforesaid.

By § 5, in default of appearance of any infant, feme covert, or lunatic, in his or her own person, or by his or her guardian, committee, or attorney in that behalf, and of acceptance of such admittance as aforesaid, the lord of such manor or his steward, after such three courts holden and proclamations in such courts regularly made, to appoint at any subsequent court any fit person to be attorney for every such infant, feme covert, or lunatic for that purpose only, and by such attorney to admit every such infant, feme covert, or lunatic to the said land according to such estate as such infant, feme covert, or lunatic shall be legally entitled to therein, and upon every such admittance to impose and set such fine as might have been legally imposed and set if such infant had been of full age, or if such feme covert had been sole and unmarried, or if such lunatic had been of sane mind.

" § 6. And be it further enacted, that upon every such admittance of any infant, feme covert, or lunatic as aforesaid, the fine imposed and set thereupon shall and may be demanded by the bailiff or agent of the lord of such manor by a note in writing, signed by the lord of such manor or by his steward, to be left with the guardian of such infant, or such infant if he have no guardian, or with such feme covert or her husband, or with the committee of the estate of such lunatic, or with the tenant or occupier of the land to which such infant, feme covert, or lunatic shall have been admitted as aforesaid; and if the fine so imposed and set be not paid or tendered to such lord or steward within three months after such demand made, then it shall be lawful for the lord of such manor to enter into and upon the copyhold land to which any such infant, feme covert, or lunatic shall be so admitted, and to hold and enjoy the same, and to receive the rents, issues, and profits thereof, but without liberty to fell any timber standing thereon for so long time only, and until by such rents, issues, and profits, such lord shall be fully paid and satisfied such fine, together with all reasonable cost and charges which such lord shall have been put unto in levying and raising the same, and in obtaining the possession of such copyhold land, although such infant, feme covert, or lunatic shall happen to die before such fine and fines and the costs and charges aforesaid shall be raised and collected; of all which rents, issues, and profits so to be received by such

lord of such manor, or his steward, bailiff, or servant upon the occasion aforesaid, such lord shall yearly and every year, upon demand to be made by the person who shall be entitled to the surplus of the said rents and profits, over and above what will pay and satisfy such fine and costs and charges, or by the person who shall be then entitled to such copyhold land, give and render a just and true account, and shall pay the same surplus, if any, to such person as shall be entitled to the same.

" § 7. And be it further enacted, that as soon as such fine, and the costs, charges, and expenses aforesaid shall be fully paid and satisfied, or if after such seizure and entry of and upon such copyhold land for the purposes aforesaid, such fine and the costs and charges aforesaid shall be lawfully tendered and offered to be paid and satisfied to the lord of such manor, then and in any of the said cases it shall be lawful for such infant, feme covert, lunatic, or other person entitled thereto, or the guardian of such infant, the husband of such feme covert, or the committee of such lunatic, to enter upon and take possession of and hold the said copyhold land according to the estate or interest such infant, feme covert, or lunatic shall be lawfully entitled to therein, and the lord of such manor shall and is hereby required in any of the said cases to deliver possession thereof accordingly; and if such lord, after such fine and the costs and charges aforesaid shall be fully paid and satisfied, or after the same shall have been tendered or offered to be paid as aforesaid, shall refuse to deliver the possession of the said copyhold land as aforesaid, he or they shall be liable to and shall make satisfaction to the person or persons so kept out of possession, for all the damages that he or she shall thereby sustain, and all the costs and charges that he or she shall be put unto for the recovery thereof.

" § 8. And be it further enacted, that where any infant, feme covert, or lunatic, shall be admitted to any copyhold lands, if the guardian of such infant, or husband of such feme covert, or committee of such lunatic shall pay to the lord of any manor the fine legally imposed and set upon such admittance, and the cost and charges which such lord of such manor shall have been put unto as aforesaid, then it shall be lawful for every guardian of such infant, or husband of such feme covert, or committee of such lunatic, his executors and administrators, to enter into and to hold and enjoy the said land to which such infant, feme covert, or lunatic shall have been so admitted, and receive and take the rents, issues, and profits thereof to his and their own use, until thereby such guardian of such infant, or husband of such feme covert, or committee of such lunatic, his executors and administrators, shall be fully satisfied and paid, all and every such sum and sums of money as he shall respectively pay and disburse upon the account aforesaid, notwithstanding the death of such infants, femes covert, or lunatic shall happen before such sum or sums of money so expended shall or may be so raised and reimbursed.

" § 9. Provided always, and be it further enacted, that from and after the passing of this act, no infant, feme covert, or lunatic shall forfeit any copyhold land for his or her neglect or refusal to come to any court to be kept for any manor whereof such land is parcel, and to be admitted thereto, nor for the admission, denial, or refusal of any such infant, feme covert, or lunatic to pay any fine imposed or set upon his or her admittance to any such land.

" § 10. Provided nevertheless, and be it further enacted, that if the fine imposed in any of the cases hereinbefore mentioned, shall not be warranted

by the custom of the manor, or shall be unlawful, then such infant, feme covert, or lunatic shall be at liberty to controvert the legality of such fine, in such manner as he or she might have done if this act had not been made.

"§ 11. And be it further enacted, that it shall be lawful for any person, not being under coverture, and for every feme covert, (such feme covert being solely and secretly examined by the lord of the manor, whereof the land, of which a common recovery is proposed to be suffered, shall be holden, by copy of court roll, or in ancient demesne, or otherwise, or by his steward or by the deputy of such steward,) to appoint any person to be his or her attorney, for the purpose of surrendering the land of which a common recovery shall be proposed to be suffered, to the use of any person to make him tenant to the plaint, and also to appoint any other person to appear for the person so appointing as vouchee, and to enter into the usual warranty, and to do all other lawful and necessary acts for the suffering and perfecting of such common recovery respectively, and to direct the demandant in such common recovery respectively to surrender the tenements so recovered, when or after such recovery shall be suffered and perfected, to such uses as shall be declared in the instruments by which such attorney shall be respectively appointed; and that the surrender and common recovery which shall be had, acknowledged, and suffered as aforesaid, shall have the like effect, but no other, as such surrender and common recovery would have had, if the party who shall acknowledge such surrender and suffer such common recovery, by attorney, and give such directions as aforesaid, had appeared in court in his or her person, and acknowledged the said surrender, and suffered the same recovery, and had joined in the surrender to be made by such defendant.

"§ 12. And be it further enacted, that in all cases where any person, being under the age of twenty-one years, or a feme covert, is or shall become entitled to any lease or leases made or granted, or to be made or granted for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful for such person under the age of twenty-one years, or for his or her guardian, or other person on his behalf, and for such feme covert, or any person on her behalf, to apply to the Court of Chancery in England, the courts of equity of the counties palatine of Chester, Lancaster, and Durham, or the courts of great session of the principality of Wales respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and by the order and directions of the said courts respectively, such infant, or feme covert, or his guardian, or any person appointed in the place of such infant or feme covert, by the said courts respectively, shall and may be enabled from time to time, by deed or deeds to surrender such lease or leases, and accept and take in the place and for the benefit of such person under the age of twenty-one years, or feme covert, one or more new lease or leases of the premises comprised in such lease surrendered by virtue of this act, for and during such number of lives, or for such term or terms of years, determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise as the said courts shall respectively direct.

"§ 13. And be it further enacted, that in all cases where any person,

being lunatic, shall become entitled to any lease or leases made or granted, or to be made or granted for the life or lives of one or more person or persons, or for any term of years, either absolute, or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful for the committee of the estate of such person, to apply to the lord chancellor of Great Britain, being intrusted, by virtue of the king's sign manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, by petition or motion in a summary way; and by the order and direction of the said lord chancellor, intrusted as aforesaid, such committee shall and may be enabled from time to time by deed or deeds, in the place of such lunatic, to surrender such lease or leases, and accept and take, in the name and for the benefit of such lunatic, one or more new lease or leases of the premises comprised in such lease or leases surrendered by virtue of this act, for and during such number of lives, or for such term or terms of years absolute or determinable as aforesaid, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise, as the said lord chancellor, intrusted as aforesaid, shall direct.

"§ 14. And be it further enacted, that every sum of money or other consideration paid by any guardian, trustee, committee, or other person, as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant, or lunatic, for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the said courts and lord chancellor, intrusted as aforesaid respectively, shall direct and determine; and as to leases to be made upon surrenders by femes covert, unless the fine and consideration of such lease, and the reasonable charges shall be otherwise paid or secured, the same, together with interest, shall be a charge upon such leasehold premises, for the benefit of the person who shall advance the same.

"§ 15. And be it further enacted, that every lease to be renewed as aforesaid, shall operate and be to the same uses, and be liable to the same trusts, charges, encumbrances, dispositions, devises and conditions, as the lease to be from time to time surrendered as aforesaid was or would have been subject to, in case such surrender had not been made.

"§ 16. And be it further enacted, that wherever the person, being under the age of twenty-one years or a feme covert, might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years, absolute or determinable on the death of one or more person or persons, it shall be lawful to and for such infant, or his guardian in the name of such infant, or such feme covert, by direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, or of such feme covert, or of any person entitled to such renewals, from time to time, to accept of a surrender of such lease, and to make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise, as the court by such order shall direct.

(F) How far their Acts are good, &c.

"§ 17. And be it further enacted, that where any person, being an infan under the age of twenty-one years, is or shall be seised or possessed of, or entitled to, any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant, or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases, and covenants, and provisions therein, shall be settled and approved of by a master of the said court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the master's office, until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained. Provided that no lease be made of the capital mansion-house, and the park and grounds respectively held therewith, for any period exceeding the minority of any such infant."

Before this act the court could not grant leases of infants' estates beyond their infancy.

"§ 18. And be it enacted, that where any person, who in pursuance of any covenant or agreement in writing, might, if within the jurisdiction, and amenable to the process of the Court of Chancery, be compelled to execute any lease by way of renewal, shall not be within the jurisdiction or not amenable to the process of the said court, it shall be lawful to and for the said Court of Chancery, by an order to be made upon the petition of any person or any of the persons entitled to such renewal, (whether such person be or be not under any disability,) to direct such person as the said court shall think proper to appoint for that purpose, to accept a surrender of the subsisting lease, and make and execute a new lease in the name of the person who ought to have renewed the same; and such deed, executed by the person to be appointed as aforesaid, shall be as valid as if the person in whose name the same shall be made had executed the same, and had been alive, and not under any disability; but in every such case it shall be in the discretion of the said Court of Chancery, if under the circumstances it shall seem requisite, to direct a bill to be filed to establish the right of the party seeking the renewal, and not to make the order for such new lease unless by the decree to be made in such cause, or until after such decree shall have been made.

"§ 19. And be it further enacted, that where any person, being lunatic, is or shall be entitled or has a right, or in pursuance of any covenant or agreement might, if not under disability, be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years, absolute or determinable on the death

of one or more persons, or otherwise, it shall be lawful to and for the committee of the estate of such lunatic, in the name of such lunatic, by the direction of the lord chancellor, intrusted as aforesaid, to be signified by an order to be made, in a summary way, upon the petition of such committee, or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make and execute to any person a new lease of the premises comprised in such lease to be surrendered by virtue of this act, for and during such number of lives, or for such term or terms of years, determinable upon such number of lives or for such term or terms of years absolute, as were mentioned or contained in such lease so surrendered at the making thereof, or otherwise, as the lord chancellor, intrusted as aforesaid, by such order shall direct; and this provision shall extend as well to cases where the lunatic shall not be compellable to renew, but it shall be for his benefit to do so, as to cases where a renewal might be effectually enforced against the lunatic if of sound mind.

"§ 20. Provided always and be it further enacted, that no renewed lease shall be executed by virtue of this act, in pursuance of any covenant or agreement, unless the fine (if any) or such other sum or sums of money (if any) as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid and performed; and counterparts of every renewed lease to be executed by virtue of this act shall be duly executed by the lessee.

"§ 21. And be it further enacted, that all fines, premiums, and sums of money which shall be had, received, or paid for or on account of the renewal of any lease, after a deduction of all necessary incidental charges and expenses shall be paid, if such renewal shall be made by or in the name of an infant to his guardian, and be applied and disposed of for the benefit of such infant, in such manner as the said court shall direct; if such renewal shall be made by a feme covert, to such person or in such manner as the court shall direct for her benefit, if such renewal shall be made in the name of any person out of jurisdiction or not amenable as aforesaid, to such person or in such manner, or into the Court of Chancery to such account, and to be applied and disposed of as the said court shall direct; and if such renewal shall be made in the name of a lunatic to the committee of the estate of such lunatic, and be applied and disposed of for the benefit of such lunatic, in such manner as the lord chancellor, intrusted as aforesaid, shall direct; but upon the death of such lunatic, all such sum and sums of money as shall arise by such fines or premiums, or so much thereof as shall remain unapplied for the benefit of such lunatic, at his death shall, as between the representatives of the real and personal estates of such lunatic, be considered as real estate, unless such lunatic shall be tenant for life only, and then the same shall be considered as personal estate. (Section 22, applies to Ireland.)

"§ 23. And be it further enacted, that where any person being lunatic, is or shall be seised of any lands, either for life or some other estate, with power of granting leases and taking fines, reserving small rents on such leases for one, two, or three lives in possession or reversion, or for some number of years, determinable upon lives, or for any term of years absolutely, such power of leasing which is or shall be vested in such person, being lunatic, and having a limited estate only, shall and may be executed by the committee of the estate of such person, under the direction and order of the lord chancellor, intrusted as aforesaid.

(F) How far their Acts are good, &c.

" § 24. And be it further enacted, that where any person being lunatic is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the lord chancellor, intrusted as aforesaid, to be for the benefit of such person, that a lease or an under-lease should be made of such estates for terms of years, for the encouraging the erection of buildings therein, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, it shall be lawful for the lord chancellor, intrusted as aforesaid, to order and direct the committee of the estate of such lunatic to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively for such term or terms of years, and subject to such rents and covenants, as the lord chancellor, intrusted as aforesaid, shall direct.

" § 25. And whereas, by an act passed in the first year of the reign of King George the First, intituled *An Act for making more effectual her late majesty's gracious intentions for augmenting the maintenance of the poor clergy*, it was enacted that the agreements of guardians for and behalf of infants or idiots under their guardianships, should be as good and effectual to all intents and purposes as if the said infants or idiots had been of full age and of sound mind, and had themselves entered into such agreements: and whereas it is desirable that the said powers should be exercised under proper control, and that the same should be extended to all persons against whom a commission of lunacy shall have issued; be it further enacted, that so much of the said act of the first year of the reign of King George the First as is hereinbefore recited shall be and the same is hereby repealed.

" § 26. And be it further enacted, that the guardian of any infant, with the approbation of the Court of Chancery, to be signified by an order to be made on the petition of such guardian in a summary way, may enter into any agreement for or on behalf of such infant, which such guardian might have entered into by virtue of the said last-recited act, if the same had not been repealed; and the committee of the estate of any lunatic, with the approbation of the lord chancellor, intrusted as aforesaid, to be signified by an order to be made in the petition of such committee in a summary way, may enter into any agreement for or on the behalf of such lunatic, which the guardian of an infant might have entered into for or on the behalf of such infant by virtue of the said last-recited act, if the same had not been repealed.

" § 27. And be it further enacted, that where any person who shall have contracted to sell, mortgage, let, divide, exchange, or otherwise dispose of any land, shall afterwards become lunatic, and a specific performance of such contract, either wholly or so far as the same shall remain to be performed, shall have been decreed by the Court of Chancery, either before or after such lunacy, it shall be lawful for the committee of the estate of such lunatic, in the place of such lunatic, by the direction of the lord chancellor, intrusted as aforesaid, to be signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in such suit, to convey such land in pursuance of such decree to such person and in such manner as the said lord chancellor, intrusted as aforesaid, shall direct, and the purchase-money, or so much thereof as remains unpaid, shall be paid to the committee of such lunatic.

Before this act the court could not give a good title to a vendee where the vendor

became lunatic, though the court would enforce specific performance of the contract by the vendee.

"§ 28. And be it further enacted, that it shall be lawful for the lord chancellor, intrusted as aforesaid, to order any land of or to which any person being lunatic shall be seised or possessed, or entitled to be sold, or charged and encumbered by way of mortgage or otherwise disposed of, as shall be deemed most expedient for the purpose of raising money for the payment of the debts or engagements of such lunatic; the discharge of any encumbrances on his estates, the costs of applying for and obtaining the commission of lunacy and in opposition thereto and all proceedings under the said commission, and the costs of such sales, mortgages, charges, and encumbrances, and other dispositions, or for any such purposes as aforesaid, as such lord chancellor, intrusted as aforesaid, shall respectively direct; and that the moneys arising from any such sale, mortgage, charge, encumbrance, or other disposition may be paid, laid out, and applied in payment of the debts and engagements of such lunatic, the discharge of any encumbrances on his estates, the costs of applying for and obtaining the commission of lunacy and in opposition thereto, and all proceedings under the same commission, or incurred under the order of such lord chancellor, intrusted as aforesaid, and the costs of such sales, mortgages, charges, and encumbrances, and other dispositions, in such manner as the said lord chancellor, intrusted as aforesaid, shall direct; and to direct the committee of the estate of such person to execute in the place of such person respectively, conveyances of the estates so to be sold, mortgaged, encumbered, or disposed of, and to do all such acts as shall be necessary to effectuate the same in such manner as such lord chancellor, intrusted as aforesaid, shall direct.

"§ 29. Provided always, and be it further enacted, that on any sale, mortgage, charge, encumbrance, or other disposition which shall be made in pursuance of this act, the person whose estate shall be sold, mortgaged, charged, encumbered, or otherwise disposed of, and his or her heirs, next of kin, devisees, legatees, executors, administrators, and assigns, shall have such and the like interest in the surplus which shall remain, after answering the purposes aforesaid, of the money raised by such sale, mortgage, charge, encumbrance, or other disposition as he, she, or they would have had in the estate, by the sale, mortgage, charge, encumbrance, or other disposition of which such moneys shall be raised, if no such sale, mortgage, charge, encumbrance, or other disposition had been made; and such moneys shall be of the same nature and character as the estate so sold, mortgaged, charged, encumbered, or disposed of; and it shall be lawful for the said lord chancellor, intrusted as aforesaid, to make such orders, and direct such acts and deeds to be done and executed as shall be necessary for carrying the aforesaid objects into effect, and for the due application of such surplus moneys.

"§ 30. Provided nevertheless, and be it enacted, that nothing in this act contained shall extend to subject any part of the estates of any person being lunatic to the debts or demands of his creditors, otherwise than as the same are now subject and liable by due course of law, but only to authorize the lord chancellor, intrusted as aforesaid, to make order in such cases as are hereinbefore mentioned, when the same shall be deemed just and reasonable, or for the benefit or advantage of such lunatic.

"§ 31. And be it further enacted, that every surrender and lease, agreement, conveyance, mortgage, or other disposition respectively granted and

accepted, executed and made, by virtue of this act, shall be and be deemed as valid and legal to all intents and purposes, as if the persons by whom, or in whose place, or on whose behalf, the same respectively shall be granted or accepted, executed and made, had been of full age, unmarried, or of sane mind, and had granted, accepted, made, and executed the same; and every such surrender and lease respectively made and accepted by and on the behalf of a feme covert shall be valid without any fine being levied by her.

" § 32. And be it further enacted, that it shall be lawful for the Court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money by virtue of any act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said court, to direct all or any part of the dividends due or to become due in respect of such stocks, or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of such court, for the maintenance and education, or otherwise for the benefit of such infant, such guardian, or other person to whom such payment shall be directed to be made, being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sums of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.

" § 33. And be it further enacted, that where any stock shall be standing in the name of, or shall be vested in any person being lunatic, who shall be beneficially entitled thereto, or shall be standing in the name of or vested in any person being committee of the estate of a person found lunatic, in trust for or as part of his property, and such committee shall have died intestate, or shall himself become lunatic, or shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain whether such committee be living or dead, or such committee shall neglect or refuse to transfer such stock, and to receive and pay over the dividends thereof to a new committee, or as he shall direct, for the space of fourteen days next after a request in writing to that purpose shall have been made by any new committee, then and in every or any such case it shall be lawful for the lord chancellor, intrusted as aforesaid, upon the petition of the committee of the estates of the person being lunatic, or of the person reported by the master to whom the matter is referred as a proper person to be such committee, although such report shall not have been confirmed, to direct such person as such lord chancellor shall think proper to appoint for that purpose to transfer such stock to or into the name of any new committee, or in the name of the accountant-general of the said court or otherwise; and also to receive and pay over the dividends thereof, or such sum or sums of money in such manner as such lord chancellor shall think proper, and such transfers and payments shall be valid and effectual to all intents and purposes whatsoever.

" § 34. And be it further enacted, that where any stock shall be standing in the name of or vested in any person residing out of England, it shall be lawful for the lord chancellor, intrusted as aforesaid, upon petition and proof being made to his or their satisfaction that such person has been declared lunatic, and that his personal estate has been vested in a curator or other person appointed for the management thereof, according to the

laws of the place where such person shall reside, to direct any person whom such lord chancellor shall think proper to appoint for that purpose to transfer such stock or any part or parts thereof into the name of any such curator or other such person as aforesaid or otherwise; and also to receive and pay over the dividends thereof as such lord chancellor shall think fit, and that such transfers and payments shall be valid and effectual to all intents and purposes.

"§ 35. And be it further enacted, that the Court of Chancery or lord chancellor intrusted as aforesaid, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, and transfers to be made in pursuance of this act or any of them, to be paid and raised out of or from the lands or stock, or the rents or dividends, in respect of which the same respectively shall be made in such manner as the said court or lord chancellor shall think proper.

"§ 36. And be it further enacted, that the powers and authorities given by this act to the Court of Chancery in England shall extend to all land and stock within any of the dominions, plantations, and colonies belonging to his majesty, except Scotland.

"§ 37. And be it further enacted, that the powers and authorities given by this act to the Court of Chancery shall and may be exercised in like manner by, and are hereby given to the Court of Exchequer.

"§ 38. And be it further enacted, that the powers and authorities given by this act to the Courts of Chancery and Exchequer in England, shall and may be exercised in like manner, and are hereby given to the Courts of Chancery and Exchequer in Ireland with respect to land and stock in Ireland.

"§ 39. And be it further enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain, intrusted as aforesaid, shall extend to all land and stock wheresoever, within any of the dominions, plantations, and colonies belonging to his majesty, except Scotland and Ireland.

"§ 40. And be it further enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by, and are hereby given to the lord chancellor of Ireland, intrusted as aforesaid, with respect to all land and stock in Ireland, but not further or otherwise.

"§ 41. And whereas it is desirable that in some cases inquisitions taken in England on a commission in the nature of a writ *de lunatico inquirendo* and writs of *supersedeas* of any such commission, shall be acted upon in Ireland in the same manner as the same may be acted upon in England, and for that purpose shall be placed upon record in Ireland; and that inquisitions on a like commission executed in Ireland, and writs of *supersedeas* of any such commission shall be acted on in England, and for that purpose shall be placed on record there; be it therefore enacted, that in all cases where any person has been or shall be found lunatic or of unsound mind, and incapable of managing his or her affairs by any inquisition on a commission in the nature of a writ *de lunatico inquirendo* under the great seal of Great Britain, it shall be lawful for the proper officer, by order of the lord chancellor of Great Britain, intrusted as aforesaid, to transmit a transcript of the record of such inquisition to the Chancery of Ireland, and such transcript shall thereupon be entered of record and be as of record there; and in case

a writ of *supersedeas* of any such commission shall issue, the issue of such writ shall be certified and transmitted and recorded in like manner, and the copies of the record of any such inquisition or *supersedeas* so transmitted and entered as of record in the Chancery of Ireland shall, if the lord chancellor of Ireland, intrusted as aforesaid, shall see fit, and so long only as he or they shall so see fit, be acted upon by him or them respectively, and be of the same force and validity, and have the same effect to all intents and purposes in Ireland, as if such inquisition had been taken on a commission under the great seal of Ireland, and such writ of *supersedeas* had been issued under the great seal of Ireland; and that in all cases where any person has been or shall be found lunatic or of unsound mind, and incapable of managing his or her affairs, by any inquisition on a commission in the nature of a writ *de lunatico inquirendo* under the great seal of Ireland, it shall be lawful for the proper officer, by order of the lord chancellor of Ireland, intrusted as aforesaid, to transmit a transcript thereof in like manner to the Chancery of England, and such transcript shall thereupon be entered as of record there; in case a writ of *supersedeas* of any such commission shall issue, a transcript thereof shall be certified and transmitted to the Chancery of England and recorded in like manner; and such entry of record of any such inquisition or *supersedeas* shall, if the lord chancellor of Great Britain, intrusted as aforesaid, shall see fit, and so long as he or they shall so see fit, be acted upon by him or them respectively, and be of the same force and validity, and have the same force and effect as if such inquisition had been taken upon a commission under the great seal of Great Britain, and such writ of *supersedeas* had been issued under the great seal of Great Britain.

"§ 42. And be it further enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by, and are hereby given to the lord keeper or commissioners of the great seal of Great Britain for the time being, intrusted as aforesaid; and the powers and authorities given by this act to the lord chancellor of Ireland, intrusted as aforesaid, shall and may be exercised in like manner by, and are hereby given to the lord keeper or commissioners of the great seal of Ireland for the time being, intrusted as aforesaid.

"§ 43. Provided always, and be it further enacted, that in all cases in which order shall be made in pursuance of this act for the transfer of stock, the person to be named in such order for making such transfer shall be some officer of such company or society in whose books such transfer shall be made; and where such transfer shall be directed to be made in books kept by the governor and company of the Bank of England, such officer shall be the secretary or deputy-secretary, or accountant-general or deputy-accountant-general for the time being of the said governor and company.

"§ 44. And be it further enacted, that this act shall be and is hereby declared to be a full and complete indemnity and discharge to the governor and company of the Bank of England, and all other companies and societies and their officers and servants, for all acts and things done and permitted to be done pursuant thereto, and that such acts and things shall not be questioned or impeached in any court of law or equity to their prejudice or detriment."‖

(G) How they are to sue and defend.

When an idiot doth sue or defend he shall not appear by guardian,(*a*) *prochein amy*, or attorney, but he must be ever in proper person.

Co. Lit. 135 b; F. N. B. 27. (*a*) The statute West. 2, c. 15, extends not to an idiot. 2 Inst. 390. ℘ In New York, when the party is an idiot or lunatic, the manner in which he shall prosecute or defend does not seem very clearly settled. Webster v. Woodward, 15 Johns. 504; Faulkner v. M'Clure, 18 Johns. 134.℘

But otherwise of him who becomes *non compos mentis;* for he shall appear by guardian, if within age, or by attorney, if of full age.

4 Co. 124 b; Palm. 520, and vide 2 Saund. 235.

℘ It is not requisite that a lunatic should be a party with his committee in a bill to set aside an act done by him while under mental imbecility.

Ortley v. Messere, 7 Johns. Ch. R. 139.

The guardian of an idiot may, in a suit in the name of the idiot, avoid his deed executed while *non compos mentis.*

Long v. Whidden, 2 N. H. Rep. 435.℘

If a trespass be committed in the lands of a lunatic who is legally committed,(*b*) the committee cannot bring an action of trespass; but this must be brought in the name of the lunatic.

2 Sid. 125; Coke v. Darston, 1 Br. & Goldesb. 197. (*b*) Where a suit was commenced to be relieved against a debt assigned by the lunatic without consideration; it was holden not necessary that the lunatic should be made a party. [For this would have been to stultify himself. 1 Ch. Ca. 113. But he may be party to a suit to enforce an agreement entered into before his lunacy, for there that objection doth not arise. 1 Ch. Ca. 153.]

If a lunatic be sued, he must have a committee assigned to him to defend the suit.

Vern. 106. ℘ *Ex parte* Leighton, 14 Mass. 207. A lunatic need not be made a party to a suit by a creditor against his committee, to obtain payment of a due by his estate. Brashear v. Van Courtlandt, 2 Johns. Ch. R. 242.℘

[So, if a person who is in the condition of an idiot or lunatic, though not found such by inquisition, is made a defendant, the Court of Chancery, upon proper information of his incapacity, will direct a guardian to be appointed.

Mitf. Eq. Pl. 95; 3 P. Wms. 111.

Informations are sometimes exhibited by the attorney-general, on behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown,] ‖and particularly, if the interests of the committee clash with those of the lunatic.

1 Ch. Ca. 112, 153; 4 Br. P. C. 559; Mitf. Eq. 23.

But in such cases, a proper relator (*c*) ought to be named; and where a person found a lunatic has had no committee, such an information has been filed, and the court has proceeded to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee.

Mitf. Eq. Pl. 23. (*c*) Attorney-General at rel. of Griffith Vaughan, a lunatic, v. Tyler, 11th July, 1764. On motion ordered, that a proper relator should be appointed, who might be responsible to the defendants for the costs of the suit. Ibid. note (*y*). 2 Eden, 230.

Persons incapable of acting for themselves, though not idiots or lunatics, have been permitted to sue in equity by their next friend, without the intervention of the attorney-general.

Mitf. Eq. Pl. 23; Elizabeth Liney, a person deaf and dumb, by her next friend

against Witherley. In Ch. Decree, 1st December, 1760. Decree on Supplemental Bill, 4th March, 1779. ‖ ℊ All actions by or on behalf of a lunatic placed by law in the care of a committee, must be in the name of the lunatic and the committee. Beale v. Coon, 2 Watts, 184. In Kentucky, the committee of a lunatic cannot maintain an action in his own name, on a covenant given to the lunatic. Cameron v. Pattinger, 3 Bibb, 11. ℊ

‖ The court refused to enlarge the time to surrender the principal by the bail, on the ground that the principal was a lunatic, it not appearing that he was in such a state as to occasion immediate peril of life to himself or others.

Cock v. Bell, 13 East, 355.

Where a tradesman supplied a person with goods suited to his station, and afterwards by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before, and at the time when the goods were ordered and supplied; it was held, that this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles not having any reason to suppose that the defendant was a lunatic.

Baxter v. Earl of Portsmouth, 5 Barn. & C. 170; 7 Dow. & Ry. 614; Brown v. Joddrell, 1 Moo. & Malk. 105, *acc.*; and see Fonbl. on Equity (5th edit.,) 47, 48.‖

INDICTMENT.

An indictment is defined an accusation at the suit of the king, by the oaths of twelve men [at least, and not more than twenty-three] of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true: But when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment,(*a*) it is called (*b*) a presentment: And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an inquisition.

2 H. H. P. C. 152; 2 Burr. 1088. (*a*) ‖ The court may reduce it into the form of an indictment without sending it back to the jury. Rookwood's Trial.‖ (*b*) A presentment is a more comprehensive term than indictment; for regularly an indictment is an accusation given in against a person by the grand inquest for some misdemeanor, whereunto he is put to answer; but presentments not only include such indictments, but also some other informations, whereunto the party is not put to answer; as presentments of *felo de se*, of *fugam fecit*, of *deodands*, of deaths *per infortunium*, *&c.* 2 Hal. Hist. P. C. 152, 153.——Regularly, all presentments and indictments are traversable, and conclude not the party or those claiming under him. 2 Hal. Hist. P. C. 153, 154.

For the better understanding the law herein, the same hath been reduced to the following heads:—

(A) Of the Nature of an Indictment, and how far it is considered as a Prosecution at the Suit of the King.

(B) Where it is necessary, or the Party may be tried for a Capital Offence without it.

(C) By whom it is to be found: And therein who may and ought to be Indictors.

(A) Of the nature of an Indictment, &c.

(D) Whether the Indictors or Grand Jury may find Part of a Bill brought before them true, and Part false.

(E) What matters are indictable.

(F) Within what Place the Offence inquired of must arise.

(G) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

1. *How the Body of an Indictment at Common Law ought to set forth the Substance and Manner of the Fact.*
2. *How the Persons mentioned or referred to in it.*
3. *How, the Thing wherein the Offence was committed.*
4. *How, the Circumstances of Time and Place.*
5. *Where the Offence indictable may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment.*
6. *Whether the Words* Vi et Armis *be in any Case necessary.*
7. *Whether it be necessary to lay the Words* contra Pacem.
8. *Whether it be necessary to lay it* contra Coronam et Dignitatem Regis.
9. *Whether it be necessary to lay it* in Contemptum Regis.
10. *Whether necessary to lay it* illicitè.
11. *Whether a Defect in any of these Particulars be amendable.*

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

1. *Whether it be necessary that such Indictment recite the Statute whereon it is grounded.*
2. *What Misrecitals of such Statutes are fatal.*
3. *How far it is necessary to bring the Offence indicted within the very Words of the Statute.*
4. *Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.*
5. *How far it is necessary to conclude* contra Formam Statuti.

(I) What ought to be the Form of a Caption of an Indictment.

(K) Where an Indictment may be quashed.

(A) Of the Nature of an Indictment, and how far it is considered as a Prosecution at the Suit of the King.

An indictment is a brief narrative of an offence committed by any person, which the public good requires should be punished; and therefore it is said to be a prosecution at the suit of the king merely.

2 Hal. Hist. P. C. 169.

Hence also, from its being the king's suit, it is every day admitted that the party, who prosecutes it, is a good witness to prove it.

2 Hawk. P. C. c. 25, § 3.

And from its being the king's suit it is agreed, that no damages can be given the party grieved upon an indictment, or any other criminal prosecution; notwithstanding the king, by his commission erecting a new court, expressly direct that the party shall recover his damages by such a prosecution.

Roll. Abr. 220; 2 Roll. Abr. 83; Cro. Car. 531, 558; 2 Hawk. P. C. c. 25, § 3.

Also, where by statute damages are given to the party grieved by the offence intended to be redressed, it seems, that they cannot be recovered on an indictment grounded on such statute, unless such method of recover-

ing them be expressly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved.

Jones, 380; Cro. Car. 448; Roll. Abr. 220; 2 Hawk. P. C. c. 25, § 3.

But, if a statute prohibit any act to be done, and by a substantive clause give a recovery by action of debt, bill, plaint, or information, but mention not indictment, the party may be indicted upon the prohibitory clause, and thereupon fined, but not to recover the penalty; as upon the statute of 3 Ja. c. 5, prohibiting recusants to baptize their children by a popish priest: but then it seems the fine ought not to exceed the penalty.

2 Hal. Hist. P. C. 171, and vide Castle's case, Cro. Ja. 643, 644, [and the distinction taken by the court in the case of the King v. Robinson, 2 Burr. 805, "that where the offence intended to be guarded against by a statute was punishable *before* the making of such statute prescribing a particular method of punishing it, there, such particular remedy is cumulative, and does not take away the former remedy: but, where the statute only enacts, that the doing any act *not punishable before*, shall for the future be punishable in such and such a particular manner, there, such particular method, by such act prescribed, must be specifically pursued; and not the common law method of an indictment." R. v. Balme, Cowp. 650, S. P. Yet the doctrine in the text will hold in respect of a new offence created by a statute, *if the penalty be annexed to it by a separate and substantive clause;* for in that case, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanor. R. v. Harris, 4 T. R. 202; R. v. Wright, 1 Burr. 543.]

But, if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit 5*l.* to be recovered by action of debt, bill, plaint, or information, he cannot be indicted for it; but the proceeding must be by action, bill, plaint, or information.

2 Hal. Hist. P. C. 171.

And although damages cannot be recovered on an indictment, yet the Court of King's Bench, having the king's privy seal for that purpose, may give to the prosecutor the third part of the fine assessed on a criminal prosecution for any offence whatsoever.

Keb. 487; 2 Hawk. P. C. c. 25, § 3.

Also, it is every day's practice of that court to induce defendants to make satisfaction to prosecutors for the costs of the prosecution, and also for the damages sustained by the injury, whereof the defendants are convicted, by intimating an inclination on that account to mitigate the fine due to the king.

2 Hawk. P. C. c. 25, § 3.

(B) Where it is necessary, or the Party may be tried for a capital Offence without it.

In all criminal causes the most regular and safe way, and most consonant to the common law, and the statutes of *magna charta*, c. 29, 5 E. 3, c. 9, 25 E. 3, c. 4, 28 E. 3, c. 3, and 42 E. 3, c. 3, is by presentment or indictment of twelve sworn men; yet, at common law, there were several means of putting the party to answer for a criminal offence without any indictment, some whereof are still in force, and others either grown obsolete, or wholly taken away by statute.

2 Hal. Hist. P. C. c. 20. ℔ By the Constitution of the United States, Amendm. art. 5, no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger. ℭ

1. If a thief or robber had, on fresh pursuit, been taken with the maniour, and the goods found upon him brought into the court with him, he might

have been tried immediately, without any indictment: And this is said to have been the proper method of proceeding in such manors which had the franchise of infangthefe, but is (*a*) obsolete at this day.

2 Hawk. P. C. c. 25, § 3. (*a*) This proceeding upon the *maniouvre* is wholly taken away by the statutes 25 E. 3, c. 4; 28 E. 3, c. 3; 42 E. 3, c. 3; 2 Hal. Hist. c. 20.

2. Another kind of proceeding in cases capital without indictment is, where an appeal is brought at the suit of the party, and the plaintiff is (*b*) nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal; and so it is in case the appellant die or release; and in such case, although the party be indicted as well as appealed, yet, upon the nonsuit of the plaintiff, the proceeding for the king shall not be upon the indictment, but upon the appeal.

2 Hal. Hist. P. C. c. 20. (*b*) Such nonsuit, &c., must be after the appellant has declared, and such appeal must have been well commenced: but for this vide 2 Hawk. P. C. c. 25, § 9.

3. If a person indicted of treason or felony confesses the fact, and accuses others of being guilty of the same offence with him, by which he becomes and is admitted an approver, the parties accused may, on his appeal, be tried without other indictment or presentment.

2 Hal. Hist. P. C. c. 20. But for the learning hereof, vide 2 Hawk. P. C. c. 24; 2 Hal. Hist. P. C. c. 225, &c.

4. There were before the statute of 1 H. 4, c. 14, appeals by particular persons, especially of treason, in parliament, which are said to have been very frequent in ancient times, and especially in the reign of Rich. 2, but are now wholly taken away by the said statute; and therefore (*c*) where in the reign of Cha. 2, the earl of Bristol preferred articles of high treason, and other misdemeanors, against the earl of Clarendon, it was resolved by all the judges, that such articles were within the said statute 1 H. 4.

2 Hale's Hist. P. C. c. 20. (*c*) State Tri. vol. 2, p. 550.—And *note*, that though in all capital offences a peer is to be tried by his peers, yet it must regularly be upon an indictment found against him by a grand jury of commoners. 2 Hawk. P. C. c. 44, § 14.

But impeachments by the House of Commons of high treason, or other misdemeanors, in the Lords' House, have been frequently in practice, notwithstanding the statute of 1 H. 4, and are neither within the words nor intent of that statute; for it is a presentment by the most solemn grand inquest of the whole kingdom.

2 Hal. Hist. P. C. c. 20. ß By the Constitution of the United States, the judgment in cases of impeachment does not extend further than the removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States.ℊ [But in the case of commoners, impeachments are now confined to misdemeanors, though perhaps it was formerly otherwise. Fitzharris's case, 1681; 8 Grey's Debates, 332; Seld. Jud. Parl.—Parl. Hist. temp. Rich. 2.]

5. If in a civil action in the King's Bench *de muliere abductâ cum bonis viri*, upon not guilty pleaded, the defendant be convicted and found guilty of having carried away the woman and goods with force and feloniously, he may be put to answer the felony without farther accusation; for such a charge, by the oaths of twelve men on their inquiry into the merits of a cause, in a court which has jurisdiction over the crime, is equivalent to an indictment; and the king being always, in judgment of law, present in court, may take advantage of any matter therein properly disclosed for his benefit.

2 Hawk. P. C. c. 25, § 6; and several authorities there cited. 2 Hal. Hist. c. 20

(C) By whom it is to be found, &c.

So, if upon a special verdict, in a common action of trespass brought in the King's Bench, it be found that the defendant took the goods feloniously, this may serve for an indictment.

2 Hawk. P. C. c. 25, § 6; 2 Hal. Hist. c. 20.

So, if in an action of slander, for calling a man thief, the defendant justify that he stole goods, and issue be thereupon taken, and it be found for the defendant; if this be in the King's Bench, and for felony in the same county where the court sits, or if it be before justices of assize, who have also a commission of jail-delivery, he shall be forthwith arraigned upon this verdict as on an indictment; and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, though in a civil action, serves the king's suit as an indictment, and is not contrary to the acts of 25 E. 3, c. 4, 28 E. 3, c. 3, and 42 E. 3, c. 3, which enact, that no man shall be put to answer, &c., but by indictment or presentment.

2 Hal. Hist. P. C. c. 20.

But such a finding, in a court which hath not criminal jurisdiction, is of no force.

2 Hawk. P. C. c. 25, § 6.

Neither shall a jury's finding A guilty on the trial of an indictment against B amount to an indictment against B, because the finding of one man guilty on the trial of another is extrajudicial, except only in the case of a coroner's inquest of death, taken on view; for the finding of a stranger guilty, upon the acquittal of a defendant, on the trial of such an inquest, is not wholly extrajudicial, because the jury acquitting the man on such an inquest must inquire what other person did the fact.

2 Hawk. P. C. c. 25, § 6.

Also, if on a declaration in the King's Bench against A for having been guilty of a misdemeanor *simul cum* B the jury find B guilty; it is said, that such a finding is equivalent to an indictment, because it is not wholly extrajudicial.

2 Hawk. P. C. c. 25, § 6.

6. If the sheriff return a rescue of a prisoner taken for felony, or breach of prison by one arrested for felony, this is not sufficient to arraign the party, nor doth it (*a*) countervail an indictment, for it is not by the oath of twelve men.

2 Hal. Hist. P. C. c. 20; 2 Hawk. P. C. c. 25, § 14. (*a*) But an abuse offered to the process of a court, is such a contempt as is punishable by imprisonment; for though by the statute of *magna charta*, *&c.*, no man is to be imprisoned *sine judicio parium*, *vel per legem terræ*; yet it is one part of the law of the land to commit for contempts, not taken away by any statute. Vide tit. *Attachments*.

And although informations are practised oftentimes in the crown-office in cases criminal, and by many penal statutes, the prosecution upon them is by the acts themselves limited to be by bill, plaint, information, or indictment, yet the method of prosecution of capital offences is still to be by indictment, except in the cases above mentioned.

2 Hal. Hist. P. C. c. 20; vide 5 Mod. 459, &c.

(C) By whom it is to be found: And herein who may and ought to be Indictors.

Every indictment is to be found by (*b*) twelve lawful liege freemen of the (*c*) county wherein the crime was committed, returned by the proper officer, without the nomination of any other person.

But for this, vide head of *Juries*. (*b*) If it appears by the caption of the indictment,

(D) Whether part of a bill may be found true, &c.

or otherwise, that it was found by less than twelve men, the proceedings upon it will be erroneous. 2 Hawk. P. C. 215. ℔ Low's case, 4 Greenl. 439.℈ [Nor ought there to be more than twenty-three. 2 Burr. 1008.] But, if there be thirteen, or more, of the grand jury, and twelve agree, it is sufficient, though the rest dissent. 2 Hal. Hist. P. C. 161. (*c*) For they are sworn *ad inquirendum pro corpore comitatûs*, and cannot regularly inquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament. 2 Hal. Hist. P. C. 163. ℔ See State v. Oldham, 1 Hayw. 350.℈

They must be *probi et legales homines;* therefore it is a good exception to one returned on a grand jury, that he is an alien or villain, attainted in a conspiracy, or *decies tantum*, or of perjury, or(*a*) outlawed, or attaint of felony or *præmunire*.

2 Hal. Hist. P. C. 155. ℔ See State v. Glasgow, Cam. & Norw. 38.℈ (*a*) Though it be in a personal action. 2 Hal. Hist. P. C.—But this is left a *quære* in 2 Hawk. P. C. c. 25, § 18.

℔ In New Jersey, an inquisition purporting to be taken "on the oaths and affirmations of" A B, &c., is bad, unless it set forth that those who were affirmed were Quakers or conscientiously scrupulous against taking an oath.

State v. Putnam, 1 Coxe, 260; State v. Harris, 2 Halst. 361; State v. Fox, 4 Halst. 244.

The court cannot lawfully order a grand juror to withdraw himself from the panel in a particular case.

Baldwin's case, 2 Tyl. 473; Tucker's case, 8 Mass. 286.

An indictment found by a grand jury summoned by a sheriff without process, will be quashed.

Nicholls v. State, 2 South. 539. See People v. M'Kay, 18 Johns. 212.

In New Jersey, the act of assembly requires that in an indictment for a rape the grand jurors shall be freeholders; it is therefore a good plea in abatement that one of the jurors who found the bill was not a freeholder.

State v. Rockafellow, 1 Halst. 332. See The People v. Jewett, 6 Wend. 386; Bonds v. The State, Mart. & Yerg. 143; Cornwell v. The State, Mart. & Yerg. 147.

A plea in abatement to an indictment for embezzling the money of a bank, "That one of the jurors on the grand jury was a stockholder in said bank, and possessed a large amount of its promissory notes, and was greatly interested in procuring said indictment," is bad on general demurrer.

State v. Rickey, 5 Halst. 83.℈

(D) Whether the Indictors, or Grand Jury, may find Part of a bill brought before them true, and Part false.

It seems to be generally agreed, that a grand jury must find either *billa vera*, or *ignoramus* for the whole; and that if they take upon them to find it specially or conditionally, or to be true for part only, and not for the rest, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew. (*b*)

2 Roll. Rep. 52; 3 Buls. 206; Roll. Rep. 407; 2 Hawk. P. C. c. 25, § 2. ℔ An indictment not certified to be "a true bill," though signed by the foreman of the grand jury, is bad. Webster's case, 5 Greenl. 432.℈ (*b*) [This doctrine relates only to cases where the grand jury take upon themselves to find part of the *same* indictment true, and part false; for there they neither affirm nor deny the fact submitted to their inquiry. But, where there are two distinct counts, viz. one for an assault, and the other for a riot, they may find a true bill as to the one, and endorse *ignoramus* as to the other; for this finding leaves the indictment as to the count found, just as if there had been originally only that one count. R. v. Fieldhouse, Cowp. 325.]

(D) Whether part of a bill may be found true, &c.

Hence it hath been holden, that if a grand jury endorse a bill of murder, *billa vera se defendendo*, or *billa vera* for manslaughter, and not for murder, the whole is void. And the reason hereof given, is, that the grand jury are not to distinguish betwixt murder and manslaughter, for it is only the circumstance of malice that makes the difference, and that may be implied by the law without any fact at all, and so it lies not in the judgment of a jury, but of the judge. Also, the intention of their finding indictments is, that there may be no malicious prosecution; and therefore if the matter of the indictment be not framed of malice, but is *verisimilis*, though it be not *vera*, yet it answers their oaths to present it.

3 Buls. 206; 2 Roll. Rep. 52; Sid. 23; 2 Keb. 180; Keil. 50.

But it seems to be now agreed, that the grand jury may, without subjecting themselves to any punishment, find part of a bill true, and part false, and that against the direction of the court.

Vide 2 Hal. Hist. 161, *et* vide tit. *Juries*.

And it is said by Hale, that if a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manslaughter, and *ignoramus quoad* murder, the usual course is, in the presence of the grand jury, to strike out *malitiosè* and *ex malitiâ suâ præcogitatâ*, and *murdravit*, and leave in so much as makes the bill to be but bare manslaughter.

2 Hal. Hist. 162.

But yet the safest way is to deliver them a new bill for manslaughter, and they to endorse it generally *billa vera*, for the words of the endorsement make not the indictment, but only evidence the assent or dissent of the grand inquest; it is the bill itself which is the indictment, when affirmed.

2 Hal. Hist. 162.

But notwithstanding this discretionary power in the grand jury, yet, by the same author, if A be killed by B, so that *constat de personâ occisi et occidentis*, and a bill of murder be presented to them regularly; they ought to find the bill for murder, and not for manslaughter, or *se defendendo;* because otherwise offences may be smothered without due trial, and when the party comes upon his trial, the whole fact will be examined before the court and the petit jury. And in many cases it is a great disadvantage to the party accused; for if a man kill B in his own defence, or *per infortunium*, or possibly in executing the process of law, upon an assault made upon him, or in his own defence upon the highway, or in defence of his house against those who come to rob him, (in which three last cases it is neither felony nor forfeiture, but upon not guilty pleaded, he ought to be acquitted;) yet, if the grand inquest find *ignoramus* upon the bill, or find the special matter, whereby the prisoner is dismissed and discharged, he may nevertheless be indicted for murder seven years after.

2 Hal. Hist. 158.

If the grand jury endorse an indictment on the statute of news *billa vera*, but whether *ista verba prolata fuerunt malitiosè, seditiosè, vel contra ignoramus;* or if they endorse an indictment of forcible entry and forcible detainer, *billa vera* as to the forcible entry, and *ignoramus* as to the forcible detainer; or if they endorse, that if the freehold were in J S or the possession were in J S, then they find *billa vera;* the whole is void.

Yelv. 99; 2 Hawk. P. C. c. 25, § 2. β An indictment contained a count for a *riot and assault*, and the jury found a true bill as to the defendants, that he were *guilty of a riot;* held to be a partial finding and void. State v. Creighton, 1 Nott & M'C. 256. β

(E) What Matters are indictable.

Not only capital offences, such as treasons and felonies, are indictable, but likewise all other crimes being of a public nature, and *mala in se*, though of an inferior kind; as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other (*a*) misdemeanors whatsoever of a public evil example against the common law, may be indicted.

2 Hawk. P. C. c. 25, § 4. ℘ It seems that whatever amounts to a public wrong may be indicted. Respublica v. Teischer, 1 Dall. 338; Respublica v. Sweers, 1 Dall. 41; Wreisback v. Stone, 2 Watts & S. 408; Commonwealth v. Taylor, 5 Binn. 281; Commonwealth v. Sharpless, 2 Serg. & R. 91; Respublica v. Powell, 1 Dall. 47; Commonwealth v. Eckert, 2 P. A. Browne, 251; United States v. Ravara, 2 Dall. 299, n.; Pennsylvania v. Gillespie, Addis. 267; Pennsylvania v. Keffer, Addis. 290; Pennsylvania v. Morrison, Addis. 274; Commonwealth v. Baynton, 2 Mass. 77; Commonwealth v. Judd, 2 Mass. 329; The People v. Sands, 1 Johns. 78; The State v. Stutson, Kirby, 52; State v. Caldwell, 2 Tyl. 212; State v. White, 2 Tyl. 352; State v. Hobbs, 2 Tyl. 380; Kanavan's case, 1 Greenl. 226; Commonwealth v. Brown, 13 Mass. 356; Commonwealth v. Hoxey, 16 Mass. 385; Commonwealth v. Silsbee, 9 Mass. 417; State v. Briggs, 1 Aik. 226; State v. M'Leran, 1 Aik. 311; State v. Duncan, 1 M'Cord, 404; Bell v. Graham, 1 Nott & M'Cord, 278; Commonwealth v. Lampton, 4 Bibb, 261; Knowles v. The State, 3 Day's Cases, 103; United States v. Phelps, 4 Day's Cases, 469; People v. Ruggles, 8 Johns. 290. ℘ (*a*) Where one was indicted for hiring a man to kill the master of the Rolls, and for wearing a sword with an intent to kill the master of the Rolls, &c., or to that effect, it was moved in arrest, that an attempt only is not punishable in our law, *et non efficit canatus nisi sequatur effectus;* but the court held clearly, that though in cases of felony the law be not as it was heretofore, when *voluntas reputabatur pro facto*, yet, as to matters of misdemeanor, attempts and conspiracies are punishable. R. v. Bacon, Sid. 230; Lev. 146, S. C.; Keb. 809, S. C.; ℘ 1 Russ. on Crimes, 44; 2 East, R. 8; 3 Pick. 26; 2 C. & P. 368; 3 Bent. Jur. Ev. 69; Bouv. L. D. *Attempt.* An attempt to cheat an individual by selling him a quantity of butter, as of a certain weight, when a stone was hidden in it and made a part of the weight, the attempt having been discovered the buyer paid only for the actual weight, was held not to be indictable. Wriesback v. Stone, 2 Watts & Serg. 408. ℘ [And see further R. v. Kinnersley, 1 Str. 193; R. v. Rispal, 3 Burr. 1320; R. v. Vaughan, 4 Burr. 2494; R. v. Scofield, Cald. 397; R. v. Higgins, 2 East, 5. Indictments also lie for refusing a public office, or neglecting duties imposed by the law. Rex v. Lone, 2 Str. 920; R. v. Jones, Ib. 1146; R. v. Boyall, 2 Burr. 832; R. v. Bootie, Ib. 864; for disobeying an order of sessions, R. v. Robinson, Ib. 799, for words in defamation of a magistrate spoken in his presence and in the execution of his office, R. v. Revel, 1 Str. 420, but *qu.* whether for such words spoken in his absence? and see R. v. Pocoke, 2 Str. 1157; R. v. Darby, 3 Mod. 139; Comb. 45, 69. Indictments have been also allowed for nuisances, in making great noises in the street, R. v. Smith, 2 Str. 704; for carrying on offensive (though it could not be proved that they were unwholesome) manufactories, as preparations of aqua fortis, or the like, R. v. White, 1 Burr. 333; for offences against common decency, as for taking up dead bodies, though for anatomical purposes, R. v. Lynn, 2 T. R. 733, for a man's public exposure of his naked person, R. v. Sir Charles Sedley, 1 Sid. 168; 2 Str. 790; R. v. Cranden, 2 Campb. 89; for using false weights and measures, for producing false tokens, and for any attempt to cheat and deceive, provided they be such as people cannot by any ordinary care or prudence be guarded against; for where common prudence may guard persons from not suffering by them, the offence is not indictable. R. v. Wheatley, 2 Burr. 1129; R. v. Bower, Cowp. 323; Reg. v. Jones, 1 Salk. 379; R. v. Lara, 6 T. R. 565; R. v. Powell, 1 Stark. 402. A baker who sold bread containing alum which rendered it noxious, was holden to be indictable, though it appeared that he gave directions to his servant to mix it in a manner which might render it harmless, R. v. Dixon, 3 M. & S. 11; ℘ The State v. Smith, 3 Hawks, 378. ℘ The statute of 36 G. 3, c. 22, § 3, forbids the use of alum at all in bread.

It is an indictable offence to conspire to prevent the course of justice by producing a false certificate (under the hands of justices of the peace that a road indicted is in repair) in evidence to influence the judgment of the court. And in stating such a crime in the indictment, it is not necessary to set forth that the defendants knew at the time of the conspiracy, that the

contents of the certificate were false, it being sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so.

R. v. Mawbey, 6 T. R. 619.

But no injuries of(*a*) a private nature, unless they some way concern the king,(*b*) can be punished by way of indictment at common law.

27 Ass. pl. 20; Bro. *Indictment*, 16; Carth, 277, *Presentment*, 26. (*a*) And therefore where one was indicted for these words, viz. The justices of peace have no power to set up a watch-house where the old one stood; the indictment was quashed, because the words are not indictable, for it is a question touching a right. Trin. 27; Car. 2, Captain Cane's case.——[Selling short measure, R. v. Combrune, 1 Wils. 301; R. v. Wheatly, 2 Burr. 1125; ℘ The People v. Stone, 8 Wend. 182; The People v. Babcock, 7 Johns. R. 201; The People v. Johnson, 12 Johns. 292; ℘ R. v. Dunage, 2 Burr. 1130; R. v. Osborn, 3 Burr. 1697. ‖ Changing barley by a miller, and returning instead of it a musty and unwholesome mixture of oats and barley-meal, R. v. Haynes, 4 M. & S. 214; taking and detaining part of the corn sent to him to be ground, R. v. Chenneld, 2 Str. 793;‖ excluding commoners by enclosing, Willoughby's case, Cro. El. 90; entering a yard, erecting a shed, unthatching a house, or by numbers keeping another out of possession, if unattended with violence or riot, R. v. Storr, 3 Burr. 1698; R. v. Atkins, Ib. 1706; R. v. Blake, Ib. 1731; disobeying a by-law, R. v. Sharpless, 4 T. R. 777; ‖ not repairing a *private road*, though set out under a public act of parliament, and many individuals liable to the repair of it, R. v. Richards, 8 T. R. 634;‖ an accidental injury in a public way, in the doing of a lawful act, R. v. Gill, 1 Str. 190, all these are offences of a private nature, and of course not punishable by indictment.] (*b*) ‖ As in the case of R. v. Bembridge and Powell, cited in R. v. Southerton, 6 East, 136, who were indicted for enabling persons to pass their accounts with the pay office, in such a manner that they might defraud the government; it was objected, that this being only a private matter of account the offence was not indictable; but the court held otherwise, because it related to the public revenue.‖ ℘ Where a public officer imposed false marks on stores provided for the army of the United States, by which an injury accrued to the public, held an indictment would lie. Respublica v. Powell, 1 Dall. 47. ℘

Also generally, where a statute either prohibits a matter of public grievance, or commands a matter of public convenience, as repairing the common streets of a town, &c., every such disobedience of such statute is indictable. But, if the party hath once been fined in an action on the statute, such fine is, it seems, a good bar to the indictment, because by the fine the end of the statute is satisfied.

2 Inst. 55, 163; Cro. Ja. 577; Mod. 34; Sid. 209. [Where a statute forbids the doing of a thing, the doing of it wilfully, although without any corrupt motive, is indictable. R. v. Sainsbury, 4 T. R. 457.] ℘ When an act is not an offence at common law, but is made so by a statute, which contains a substantial prohibitory clause, it is punishable by indictment, although a particular remedy be afterwards pointed out. Wood v. Commonwealth, 12 S. & R. 213. ℘

Also if a statute extend only to (*c*) private persons; or if it extend to all persons in general, but chiefly concern disputes of a private nature, (*d*) as those relating to distresses made by lords on their tenants, it is said that offences against such statute will hardly bear an indictment.

(*c*) Sid. 209. (*d*) Mod. 71, 288; Lev. 299; Raym. 205; Vent. 104; 2 Inst. 121, 232; 2 Hawk. P. C. c. 25, § 4; 2 Keb. 687, 697.

Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular proceeding against the offender, as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning of the other methods of proceeding only, seems impliedly to exclude that by an indictment.

Show. 398; 3 Keb. 34, 273; Cro. Ja. 643, 644; 3 Mod. 79; Palm. 388; Sid. 434; 6 Mod. 86; 2 Roll. Rep. 247, 398; 2 Hawk. P. C. c. 25, § 4; 2 Str. 679.

Yet it hath been adjudged, that if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment.

Trin. 3 G. 1, R. v. Dixon; 2 Hawk. P. C. *ubi supra.*

Also, where a statute adds a new penalty to an offence prohibited also by the common law, it is in the election of the prosecutor to proceed either at common law, or on the statute; and if he conclude his indictment *contra formam statuti*, and cannot make it good as an indictment on the statute; yet, if the indictment be good as an indictment at common law, it shall stand as such, and the words *contra formam statuti* shall be rejected.

2 Hawk. P. C. *ubi supra* and *infra* (I. 3.)

β A party who raised a liberty pole in the public streets during the insurrection of the year 1794, as a notorious expression of opposition to the government, may be indicted for the offence.

Pennsylvania v. Morrison, Addis. 274.

A grand juror who voluntarily became intoxicated during the sitting of the grand jury, and thereby rendered himself incapable to perform the duty of his office, was held liable to an indictment.

Pennsylvania v. Keffer, Addis. 290.

An exhibition of an obscene picture, though such exhibition be not public, is indictable at common law.

Commonwealth v. Sharpless, 2 S. & R. 91; Knowles v. The State, 3 Day's Cas. 103.

Acts injurious to private persons which tend to excite violent resentment, and thus produce fighting and disturbance of the peace are indictable; an indictment charging that the defendant did unlawfully, maliciously, and secretly, in the night time, with force and arms break and enter into the dwelling of A, with intent to disturb the peace of the commonwealth, and so being in the said house, unlawfully, vehemently, and turbulently did make a great noise, in the disturbance of the peace of the commonwealth, and did greatly misbehave himself, and did greatly frighten and alarm the wife of the said A, by means of which fright and alarm, she being then and there pregnant did miscarry, is therefore good as an indictment for malicious mischief.

Commonwealth v. Taylor, 5 Binn. 281.

It is an indictable offence to drive a carriage through a populous and crowded street, at such a rate and manner as to endanger the lives of the inhabitants, and amounts to a breach of the public peace.

United States v. Hart, 1 Pet. C. C. R. 390.

It is indictable to destroy a tree standing on public ground, if such tree was useful for public convenience or ornament.

Commonwealth v. Eckert, 2 P. A. Browne, 251.

An indictment will lie for maliciously, wilfully, and wickedly killing a horse.

Respublica v. Teischer, 1 Dall. 335. In Tennessee, it is not requisite in such a case, to prove express malice. State v. Council, 1 Tenn. R. 305. See the People v. Smith, 5 Cowen, 258; *contra*, 3 Verm. 344.

Under the laws of the United States, it is an indictable offence to send threatening letters.

United States v. Ravara, 2 Dall. 299, n.

An indictment for perjury at common law, which charges that the defend-

ant "did, voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," negativing by express averments the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously and corruptly commit wilful and corrupt perjury," is good.

Respublica v. Newell, 3 Yeates, 407.

An indictment for a libel which charges that the defendant published a certain libel "the substance of which is as follows," is bad, because the very words of the libel must be set out.

Commonwealth v. Sweeney, 10 S. & R. 173.

A conspiracy to manufacture a base material in the form and colour of indigo, with a fraudulent intent to sell the same as good and genuine indigo, is an indictable offence.

Commonwealth v. Judd, 2 Mass. 329.

Blasphemy against God, and contumelious reproaches and profane ridicule of Christ or the Holy Scriptures, are punishable by the common law.

The People v. Ruggles, 8 Johns. 290; Updegraff v. Commonwealth, 6 S. & R. 10; 11 S. & R. 394; 5 Binn. 555.

When a public officer wickedly abuses and fraudulently exceeds the power intrusted to him, he is guilty of a misdemeanor, though no injurious effects are stated to result to individuals.

State v. Glasgow, 2 C. & N. 38.

A challenge to fight a duel out of the state is indictable.

State v. Farrier, 1 Hawks, 487.

It is an indictable offence to disturb a religious assembly during worship, (*a*) or a meeting of citizens assembled to deliberate on public concerns. (*b*)

(*a*) Bell v. Graham, 1 N. & M'C. 278; State v. Jasper, 4 Dev. 323. (*b*) Commonwealth v. Hoxey, 16 Mass. 385.

It is an indictable offence to suffer gaming in a house of which one is possessed, (*a*) and a person who lets a building for a bawdy-house, may also be indicted. (*b*)

(*a*) Commonwealth v. Lampton, 4 Bibb, 261. (*b*) Comm. v. Harrington, 3 Pick. 26; and see also Brooks v. The State, 2 Yerger, 482.

It is an indictable offence to cast the dead body of a human being into a river.

Kanavan's case, 1 Greenl. 226. An indictment may be maintained for disinterring a dead body. Comm. v. Cooley, 10 Pick. 37.

It is a misdemeanor at common law to give more than one vote for a municipal officer, at one time of balloting, although the voter be a citizen.

Commonwealth v. Silsbee, 9 Mass. 417.

It is a misdemeanor to confine colts, and from motives of wicked and malicious mischief, to fix a sharp instrument at the place of their escape, and then, with intent to wound, maim or destroy them, to force them over such instrument, whereby they are wounded, and the guilty party may be indicted for the offence at common law.

State v. Briggs, 1 Aik. 226.

A conspiracy to do any act criminal, *per se*, is an indictable offence at common law.

The State v. Buchanan, 5 Harr. & J. 317; State v. Rickie, 4 Hals. 223. See 2 Mass 337, 538; 6 Mass. 74; 3 S. & R. 220; 4 Wend. 259; 4 Hals. 293; 2 Stew. 360; 8 S. & R. 420.

(E) What Matters are indictable.

A justice of the peace is indictable for misbehaviour in his office, for acts of partiality or oppression, from corrupt motives.

The People v. Coon, 15 Wend. 277; State v. Glasgow, Ct. Rep. 38.

Acts injurious to private persons, which tend to excite violent resentment, as the malicious killing of the cow of another, are indictable.

The People v. Smith, 5 Cowen, 258.

The state cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass, that would separately support an indictment, and afterwards indict for an offence compounded of them all.

State v. Ingles, 2 Hayw. 4. See State v. Trexler, 2 Car. L. R. 90.

As a mere intention to commit a crime cannot be punished, an indictment will not lie for an intention to pass a counterfeit bank note, knowing it to be a counterfeit, where no culpable act is charged.

State v. Perry, 1 Car. L. R. 517.

An indictment will lie for sending a challenge to fight a duel out of the state, for its tendency is to rouse the passions, and produce an immediate breach of the peace.

State v. Farrier, 1 Hawks, 487.

The sale of unwholesome provisions, not fit to be eaten by man, is an indictable offence at common law.

State v. Smith, 3 Hawks, 378.

A combination by two or more to do an unlawful act, or one prejudicial to another or to the community, is indictable at common law, as a conspiracy. Such a combination to cheat a third person by making him drunk and playing at cards with him, is indictable at common law.

State v. Younger, 1 Dev. 357. See State v. Fisher, 1 Dev. 504.

A mere invasion of private property, without a disturbance of the peace, is not an indictable offence: and therefore an indictment cannot be sustained for "feloniously, maliciously and wickedly killing a beast," the property of another.

State v. Wheeler, 3 Verm. 344. *Sed* vide *contr.* Respublica v. Teischer, 1 Dall. 335; State v. Council, 1 Tenn. R. 305; The People v. Smith, 5 Cowen, 258.

It is indictable notoriously and openly to haunt and frequent houses of ill-fame.

Brooks v. The State, 2 Yerger, 482.

It is an indictable offence to break, with clubs, the windows of a dwelling-house in the night, and thus disturb the peace and quiet of a family living in the house.

The State v. Bachelder, 5 N. H. Rep. 549.

If a person who has been warned that the discharge of a gun in the neighbourhood will injuriously affect a person who is there sick, and he do discharge the gun which produces the effect, he may be indicted.

Commonwealth v. Wing, 9 Pick. 1.

‖ It is indictable unlawfully and injuriously to carry a child infected with smallpox along a public highway on which persons are passing, and near to habitations of the king's subjects.

Rex v. Vantadillo, 4 Maule & S. 73; Rex v. Burnett, Ib. 272.

An indictment lies against a clerk to an agent for foreign prisoners of war

for taking bribes in order to procure the exchange of some of them out of turn.

Rex v. Beale, 1 East, R. 183, n.

The exchanging guineas for bank notes, reckoning the guineas in such exchange at a higher value than they were current for by the king's proclamation, was held not an offence against the statute 5 & 6 Edw. 6, c. 19. In consequence of this decision the 51 G. 3, c. 127, and 52 G. 3, c. 50, continued by 53 G. 3, c. 5, to the 25th March, 1814, and further continued by 54 G. 3, c. 52, during the continuance of any act imposing any restriction on the Bank of England with respect to payments in cash made several provisions on this subject which have now ceased by the operation of the 59 G. 3, c. 49, § 1, which removed the restrictions on payments in cash under the bank acts, on the 1st of May, 1823. The 56 G. 3, c. 68, § 13, (still in force) enacts that no person shall receive or pay for any gold coin lawfully current more or less than the value which such coin by its denomination imports, and the offender shall be guilty of a misdemeanor, subject to six months' imprisonment for the first offence, and to find sureties for his good behaviour for six months more.

Rex v. De Yonge, 14 East, 402.

Threatening by letter or otherwise to put in motion a prosecution for penalties for selling a medicine without a stamp, (which stamp is required by law,) for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not resist, and therefore is not an indictable offence at common law, though it be alleged that the money was obtained; but it seems such offence is indictable on the 18 Eliz. c. 5, § 4.

Rex v. Southerton, 6 East, 126.

Compounding an offence cognisable only before magistrates, is not an indictable offence within the statute 18 Eliz. c. 5, for that statute applies only to proceedings in *courts*.

Rex v. Crisp, 1 Barn. & A. 282.

Public officers may be indicted for enabling persons to pass false accounts with the pay office in fraud of the revenue.

Rex v. Bambridge, 6 East, R. 136, n.

It seems that persons, putting on board a ship an unknown article, of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, are guilty of a misdemeanor.

Williams v. East India Company, 3 East, 201.

An *endeavour* to provoke another to commit the misdemeanor of sending a challenge to fight, is itself a misdemeanor indictable.

Rex v. Phillips, 6 East, 464.

An indictment will not lie for conspiring to commit a mere civil trespass upon property, (snaring hares in a preserve,) though alleged to be done in the night by persons armed with offensive weapons to resist any persons opposing.

Rex v. Turner, 13 East, R. 228. But see 9 G. 4, c. 69, and tit. *Game*.

It is an indictable offence to conspire, on a particular day, by false rumours, to raise the price of the public government funds, with intent to injure purchasers on that day.

Rex v. De Berenger, 3 Maule & S. 67.‖

(F) Within what Place the Offence inquired of must arise.

THE grand jury are sworn *ad inquirendum pro corpore comitatûs*, and therefore, by the common law, cannot regularly indict or present any offence which does not arise within the county or precinct for which they are returned.

2 Hal. Hist. P. C. 163; 2 Hawk. P. C. c. 25, § 34. ℬ An indictment ought to contain a proper venue, for the purpose of showing where the offence was committed. The People v. Barrett, 1 Johns. 66.ℊ [The king cannot by charter, authorize the trial of offences out of the county where they are committed, Ibid. Dougl. 796.] ℬ The indictment ought to show expressly that the county in which the offence was committed is within the jurisdiction of the court. State v. Adams, Martin, 33.ℊ

And therefore, it is a good exception to an indictment, that it doth not appear that the offence arose within such county or precinct.

2 Hawk. P. C. c. 25, § 34, and several authorities, there cited. ℬ In an indictment for conspiracy, the venue may be laid in any county in which it can be proved that an overt act was done by any one of the conspirators in furtherance of their design. The People v. Mather, 8 Wend. 229; The People v. Barrett, 1 Johns. 66.ℊ

Also, it hath been holden, that the finding of a collateral matter expressly alleged in the indictment in a different county or precinct is void.

Hawk. P. C. c. 25, § 34.

Also, it hath been generally holden, that the want of an express allegation of the precinct where the offence happened, is not supplied by putting it in the margent of the indictment, unless it go farther, as by adding *in comitatu prædicto*, &c., which seems to be sufficient, where in the body of the indictment no other county is named before.

2 Hawk. P. C. c. 25, § 34.

Also, if a fact be alleged in B *juxta D in comitatu E*, it is said, that hereby it sufficiently appears that B is in the county of E.

Cro. Ja. 41, Baud's case.

So, if an arrest be alleged in the county of A, and one be indicted for rescuing the party arrested, without saying in what county, it shall be intended to have been in the county of A, where the arrest was.

2 Hawk. P. C. *ubi supra.*

It seems also, that by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either.

2 Hawk. P. C. c. 25, § 37.

So, if A, by reason of tenure of lands in the county of B, be bound to repair a bridge in the county of C, if the bridge be in decay, he may be indicted in the county of C, that he is bound *ratione tenuræ* of lands in the county of B, to repair the bridge.

2 Hal. Hist. P. C. 164. ‖ Lord Hale refers to the 5 H. 7, 3, and 3 E. 3, Assize, 446, but *qu.*‖

Also, by the common law, if one guilty of a (*a*) larceny in one county carry the goods stolen into another, he may be indicted in either.

2 Hawk. P. C. 221. (*a*) But, if A rob B in the county of C, and carry the goods into the county of D, A cannot be indicted of robbery in the county of D, because the robbery was in another county; but he may be indicted of *larceny*, or *theft*, in the county of D, because it is theft wherever he carries the goods. The like law in an appeal. 7 Co. 2 a; 2 Hal. Hist. P. C. 163.

ℬ An indictment alleging the offence to have been committed in another district than the one in which the bill was found, is insufficient and invalid

The State v. Rav. 1 Rice, R. 1.ℊ

(F) Within what Place the Offence, &c.

If a man marry two wives, the first in a foreign country, and the second in England, he may be indicted and tried for it in England upon the statute of 1 Ja. 1, c. 11, which makes it felony, because the second marriage alone was criminal, and the first had nothing unlawful in it, and was merely of a transitory nature. And by (*a*) Hawkins, if the second marriage had been in in a foreign country, the party might have been indicted here within the purview of the said statute 1 Ja. 1.

2 Hawk. P. C. c. 25, § 39. (*a*) 1 Hawk. P. C. c. 43, § 7. But for this vide Sid. 171; Kel. 79; 1 East, P. C. c. 12, § 2.

Also, if a woman be taken by force in one county, and carried into another, and there married, the offender may be indicted, &c., in the second county on the statute of 3 H. 7, c. 2, because the continuance of the force amounts to a forcible taking.

2 Hawk. P. C. c. 25, § 40.

℘ At common law, every thief may be punished in any county in which he may take the stolen property, (*b*) but this rule does not apply when the larceny has been committed in another state; in that case the thief may be surrendered as a fugitive from justice. (*c*) But in New York, by statute, (*d*) he may be punished although the offence may have been so committed.

(*b*) People v. Burke, 11 Wend. 129. (*c*) The People v. Gardner, 2 Johns. 477; The People v. Schenck, 2 Johns. 479; Simmons v. Commonwealth, 5 Binn. 617; State v. Brown, 1 Hayw. 100. (*d*) 2 New York Rev. Stat. 698, s. 4.℘

But, if an offence in stealing a record, &c., contrary to 8 H. 6, c. 12, be committed, partly in one county, and partly in another, so as not to amount to a complete offence within the statute in either, it is said, that the party cannot be indicted for a felony in either but only for a misprision.

2 Hawk. P. C. *ubi supra.*

But notwithstanding the above instances, it seems agreed as a general rule, that, let the nature of the offence indicted be what it will, if it appear, upon not guilty, to have been committed in a different county from that in which the indictment was found, the party shall be acquitted.

2 Hawk. P. C. c. 25, § 35.

And therefore at the common law, if a man had died in one county of a stroke he received in another, it was holden that the homicide was indictable in neither, because the offence was not complete in either; but to remedy this inconvenience, it is enacted by 2 & 3 E. 6, c. 24, "That where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by the jurors of the county where the death shall happen, whether it shall be founden before the coroner, upon the sight of such dead body, or before justices of the peace, or other justices or commissioners which shall have authority to inquire of such offences, shall be as good and effectual in the law, as if the stroke or poisoning (*e*) had been committed and done in the same county where the party shall die, or where the indictment shall be so founden."

2 Hawk. P. C. c. 25, § 36. (*e*) The offender must be tried where the death happened; but an appeal may be brought in either county. 7 Co. 2, Bulwer's case, 2 Hal. Hist. P. C. 163.

So, if A had committed a felony in the county of D, and B had been accessary before or after in the county of C, B could not have been indicted as accessary in either county at common law; but by the above statute of

2 & 3 E. 6, § 4, he is indictable, and shall be tried in the county where he so became accessary.

2 Hal. Hist. P. C. 163.

It appears to have been a great doubt at common law, how treason done out of the realm was triable; some holding that it was only triable by appeal before the constable and marshal; others, that it was indictable in any county where the king pleased; and some, that it was indictable where the offender had lands: but for a plain remedy, order, and declaration of this matter, it is enacted by 35 H. 8, c. 2, "That all manner of offences, being already made and declared, or hereafter to be made and declared by any the laws and statutes of this realm, treasons, misprisions of treason, or concealments of treasons, and done, perpetrated, or committed, or hereafter to be done, perpetrated, or committed, by any person or persons out of this realm of England, shall be from henceforth inquired of, heard, and determined, before the king's justices of his Bench, for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept; or else before such commissioners, and in such shire of the realm, as shall be assigned by the king's majesty's commission, and by good and lawful men of the same shire, in like manner and form, to all intents and purposes, as if such treasons, &c., had been done, &c., within the same shire, where they shall be so inquired of, &c."

2 Hal. Hist. P. C. 163; 2 Hawk. P. C. c. 25, § 48, 49.

In the construction hereof it hath been resolved,

1. That if after an indictment has been taken in pursuance to this statute, the court, or commissioners appointed by the king, remove into a different county, the trial shall be by jurors returned from the first county,(*a*) being most agreeable to the general course of the common law, which requires that indictments shall be tried by jurors of the same county in which they were found.

2 Hawk. P. C. c. 25, § 50. (*a*) 3 Inst. 34; H. P. C. 204; Stanf. P. C. 90; Dyer, 286.

2. That the commissioners and county for the trial are well assigned by the king's writing his name to the commission, or by his signing the warrant for it.

3 Inst. 11; 2 Hawk. P. C. c. 25, § 51.

3. That an offence in Ireland, that is treason here as well as there, is triable here by virtue of this statute, unless it were committed by a peer of Irela. d; in which case it is not triable here, because the party would lose the benefit of a trial by his peers.(*b*)

2 Hawk. P. C. c. 25, § 52. (*b*) [So resolved by three judges, Dy. 360. See also O'Rouck's case, 1 Anders. 262. But in Lord Macguire's case, 1 St. Tr. 950; 1 H. H. P. C. 155, 284, it was ruled, that an Irish peer might be tried by a common jury in England for a treason committed in Ireland. See Prynn's argument, 8 St. Tr. 341.]

4. That this statute is not repealed by 1 & 2 Ph. & M. c. 10, § 7, which enacts, that all trials for treason shall be according to the common law.

2 Hawk. P. C. c. 25, § 53; 2 Hale's Hist. P. C. 164.

By the 28 H. 8, c. 15, it is enacted, that all treasons, felonies, robberies, murders, and confederacies committed upon the sea, or in any haven, river, creek, or place, where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged, in

such shires and places in the realm as shall be limited by the king's commission, in like form as if such offences had been committed on the land.

But for this vide tit. *Piracy*, and 11 & 12 W. 3, c. 7, § 1, which enacts, that all piracies and felonies upon the sea, &c., may be tried *in any place at sea*, or upon the land in his majesty's plantations. [And § 14, of the same statute, enacts, that the commissioners, &c., shall have power to try pirates in all the colonies, &c., in America, and to grant warrants, in order to their being apprehended and tried there, or sent into England for trial.]

‖And by 43 G. 3, c. 113, § 5, accessories to felonies committed upon the high seas, are to be tried by such court, and in such manner as is directed by the above statute of 28 H. 8, c. 15, for the trial of felonies committed upon the high seas.

By 46 G. 3, c. 54, all murders and other offences committed upon the sea, or in any haven, river, &c., where the admiral has jurisdiction, may be inquired of and tried according to the common course of the laws of the realm, used for offences committed upon the land within the realm, and not otherwise, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories under the king's commission; and the commissioners are to have the same powers for such trial within any such island, &c., as any commissioners appointed under the statute of 28 H. 8, c. 15, would have for the trial of offences within the realm. The provisions of this act are extended by 57 G. 3, c. 53, to murders and manslaughters committed in places not within his majesty's dominions. It enacts that murders and manslaughters committed on land, at the settlement in the bay of Honduras, by any person residing or being within the settlement, and in the islands of New Zealand and Otaheite, or within any other islands, countries, or places not within his majesty's dominions, nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or any person sailing in or belonging thereto, or that shall have sailed in and belonged to, and have quitted any British ship or vessel to live in any of the said islands, &c., or that shall be there living, may be tried and punished in any of his majesty's islands, plantations, colonies, &c., by the king's commission issued by virtue of 46 G. 3, c. 54, in the same manner as if such offences had been committed on the high seas. And by § 2, it is provided that the act shall not be construed to repeal the 33 H. 8, c. 23.

By 10 and 11 W. 3, c. 25, § 13, murders and other capital offences committed in Newfoundland, and the isles thereto belonging, may be tried in any county of England; which jurisdiction does not seem to be taken away by the subsequent statutes enabling the crown to erect courts of civil and criminal jurisdiction in that country.

By 33 H. 8, c. 23, it is enacted, that if any person being examined before the king's council, or three of them, upon any manner of treasons, misprisions of treasons, or murders, confess such offences, or if the council, or three of them, upon such examination, shall think any person so examined to be vehemently suspected of any treason, misprision of treason, or murder, the king's commission may be made to such persons, and into such shires and places as shall be named and appointed by the king, for the speedy trial of such offenders; and the commissioners shall have power to inquire and determine such offences within the shires and places limited by their commissions, in whatsoever other shire or place within the king's dominions or without such offences so examined were done or committed.

But this act of 33 H. 8, c. 23, not providing for the trial of accessories

before the fact in murder, or for the trial of the offence of manslaughter, it is enacted by the 43 G. 3, c. 113, that its powers and authorities shall be extended to the offence of procuring, directing, counselling, commanding, or otherwise becoming an accessory before the fact to any murder, and also to the offence of manslaughter.

It was in one case objected, that the statute of 33 H. 8, c. 23, did not extend to murders committed out of the realm, but the objection was overruled, the statute being clear as to that point.

Ealing's case, 1 East, P. C. 369.

By 2 G. 2, c. 21, it is enacted, "That where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of that part of Great Britain called England, and shall die of the same stroke or poisoning within that part of Great Britain called England, or where any person shall be feloniously stricken or poisoned at any place within that part of Great Britain called England, and shall die of the same stroke or poisoning upon the sea, or at any place out of that part of Great Britain called England, in either of the said cases an indictment thereof, found by the jurors of the county in that part of the kingdom of Great Britain called England, in which such death, stroke or poisoning shall happen respectively as aforesaid, whether it shall be found before the coroner upon the view of such dead body, or before the justices of the peace, or other justices or commissioners who shall have authority to inquire of murders, shall be as good and effectual in the law, as well against the principals in any such murder as the accessories thereunto, as if such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, and the offence of such accessories had happened in the same county where such indictment shall be found; and that the justices of jail-delivery and oyer and terminer, in the same county in which such indictment shall be found, and also any superior court, in case such indictment shall be removed into such superior court, shall and may proceed upon the same in all points, as well against the principals in any such murder, as the accessories thereto, as they might and ought to do in case such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, and the offence of such accessories had happened in the same county where such indictment shall be found; and that every such offender, as well principal as accessory, shall answer upon their arraignments, and have the like defences, advantages, and exceptions, (except challenges for the hundred,) and shall receive the like trial, judgment, order, and execution, and suffer such forfeitures, pains, and penalties, as they ought to do, if such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, and the offence of such accessories had happened in the same county where such indictment shall be found."‖

"By the 26 H. 8, c. 6, § 6, for the punishment and speedy trial, as well of the counterfeiters of any coin current within this realm, washing, clipping, or minishing of the same, as of all and singular felonies, murthers, wilful burning of houses, manslaughters, robberies, burglaries, rapes, and accessories of the same, and other offences feloniously done, perpetrated, and committed, or hereafter to be done, perpetrated and committed within any lordship marcher (*a*) of Wales; it is enacted, that the justices of the jail-delivery and of the peace, and every of them for the time being, in the shire or shires of England where the king's writ runneth, next adjoining to the said lordship marcher, or other places in Wales, where such counterfeiting, washing, clipping, or minishing of any coin current within this realm,

or murther, hath been or hereafter shall be committed or done, or where any other felonies or accessories shall be hereafter committed, perpetrated, or done, shall have from henceforth full power and authority at their sessions and jail-delivery, to inquire by verdict of twelve men of the same shire or shires next adjoining within England, where the king's writ runneth, there to cause such counterfeiters, washers, clippers of money, felons, murtherers, and accessories to the same, to be indicted according to the laws of this land, in like manner and form as if the same petit treasons, murthers, felonies, and accessories to the same had been done, committed, or perpetrated within any of the said shires within the said realm, and also to hear, determine, and judge the same according to the laws of this realm."

‖ In the report of the case of the King v. Athos, in 8 Mod. 137, the court are made to say, that "to try a man in Wales for murder, was like trying a man in Scotland for high treason, those being crimes not much regarded in those respective places." It was adjudged expedient, therefore, after the rebellions in 1715 and 1745, to pass acts authorizing the trial of persons charged with treasons committed upon those occasions, any where within the realm, (which, without naming, included Scotland,) in such county or counties as the crown should by commission under the great seal appoint. See st. 2 G. 1, 19 G. 2, and Fost. Cr. L. 16, Kinloch's case.‖ (*a*) This statute extends as well to the old Welsh counties, as to the lordship marchers. Pasch. 12 G. 1; Athoe's case, Str. 553; 8 Mod. 135. ‖ This clause, though general, must be intended an acquittal by paying a fine only; it was framed to meet the grievance arising from a privilege claimed by the lords marchers to pardon murders, and to acquit persons who had committed capital offences, upon paying fines, and that such acquittal should be a bar to any subsequent trial for the same fact. 8 Mod. 142.‖ But an acquittal at the grand sessions is a good bar of an indictment for the same crime in England. 2 Hawk. P. C. c. 25, § 42. ‖ This statute extends to felonies subsequently created; and therefore the trial of a prisoner in the county of Hereford for an offence committed in the county of Brecon, against the 49 G. 3, c. 80, for having forged excise stamps in his possession, was holden good. R. v. Window, 3 Campb. 78.‖

§ 7. "And that all foreign pleas pleaded by any of the said malefactors and offenders, shall be tried and determined in the said shire or shires, and that the acquittal or fine making for any of the causes aforesaid in any of the lordships marchers, shall be no bar for any person or persons being indicted in the said shire or shires, within two years next after any such murther or felony done."

By 26 G. 2, c. 19, § 8, "If oath shall be made before any magistrate, lawfully empowered to take the same, of any plunder or theft, [of any goods or merchandise, or other effects from or belonging to any ship or vessel of his majesty's subjects, or others, which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore in any part of his majesty's dominions, (whether any living creature be on board such vessel or not,) or any of the furniture, tackle, apparel, provision, or part of such ship or vessel,] and the examination in writing thereupon taken, shall be delivered to the clerk of the peace of the county, riding, or division wherein such fact shall be committed, or to his deputy, or if oath shall be made before any such magistrate of the breaking any ship contrary to 12 Ann. st. 2, c. 18, and the examination in writing thereupon taken, shall be delivered to such clerk of the peace or his deputy, then such clerk of the peace shall cause the offender or offenders in any of the said cases to be forthwith prosecuted for the same, either in the county where the fact shall be committed, or in any county next adjoining; in which adjoining county any indictment may be laid by any other prosecutor; and if the fact be committed in Wales, then the prosecution shall or may be carried on in the next adjoining English county."

(F) Within what Place the Offence, &c.

‖It has been decided, that Chester is not to be considered as an English county within either of these acts.

Case of Parry & Roberts, 1 Leach, 108; 2 East's P. C. 773.

And it is now established that Salop is the next English county to North Wales, and Herefordshire to South Wales.

Goodright v. Richards, 2 M. & S. 270.‖

By the 27 Eliz. c. 2, treasons by priests or jesuits coming into England, and felony for receiving them, are inquirable and determinable where the offender is apprehended.

2 Hale's Hist. P. C. 164.

‖Offences against the Black act, 9 G. 1, c. 22, may be inquired of and tried in any county of England, at the option of the prosecutor.

So ruled by all the judges, 11 Geo. 3, in the case of Richard Morris, on a case referred from O. B.

So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may by 8 Geo. 2, c. 20, and 13 Geo. 3, c. 84, be inquired of and tried in any adjacent county.

By 7 & 8 G. 4, c. 27, the 8 H. 6, c. 12, the 43 G. 3, c. 113, § 5, the 26 G. 2, c. 19, § 8, the 9 G. 1, c. 22, and the 8 G. 2, c. 20, referred to in tit. "*Indictment*" (F), are repealed.

By 7 G. 4, c. 64, § 12, it is enacted, that where any felony or misdemeanor shall be committed on the boundary of two or more counties, or within 500 yards of such boundary, or shall be *begun in one county and completed in another*, (*a*) the offence may be tried in any of the counties, as if wholly committed therein.

7 G. 4, c. 64, § 12. (*a*) *Qu.* Whether these words would apply to the case of a murder where the stroke or poisoning is in one county, and the death in another? If they do not, this case is unprovided for, since the 2 & 3 Ed. 6, c. 24, which made the felon triable in the county where the *death happened*, is repealed by 7 G. 4, c. 64.

By the 7 G. 4, c. 64, § 10, accessories after the fact, to felonies, whether committed on the high seas or on land, shall be triable by the court having jurisdiction to try the principal, as if the act of the accessory had been committed at the same place as the principal felony. And by § 9, a similar provision is made as to accessories *before* the fact. And if the principal felony shall be committed in the body of one county, and the offence of counselling and procuring in another, the last-mentioned offence may be tried in either.

And by § 13, where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, wagon, cart, or carriage in any journey, or in respect of property on board any vessel on any navigable river or canal, such felony or misdemeanor may be tried in any county through any part whereof such coach, wagon, or vessel shall have passed in the course of the journey or voyage.

In indictments for plundering wrecks, the venue may be laid either in the county in which the offence was committed, or the adjoining county. 7 & 8 G. 4, c. 29, § 18. In indictments for resisting excise officers, (7 & 8 G. 4, c. 53, § 43,) or for offences against the custom laws, the venue may be laid in any county, (6 G. 4, c. 108, § 78.) In indictments for robbing the mail, or stealing letters, the venue may be laid in the county of the offence or of the apprehension. 42 G. 3, c. 81, § 3; 52 G. 3, c. 143, § 3. In indictments for forgery or uttering, the venue may be laid either in the county where the offender is apprehended or in custody, or where the offence is committed. 1 Will. 4, c. 66, § 24; Russ. & R. 212. In indictments for bigamy the venue may be laid either in the county of the apprehension or of the second marriage. 9 G. 4, c. 31, § 22; Russ. & Ry. 48. It seems that since the 1 Will. 4, c. 70, indictments for offences in Wales must be laid where the offence is committed, unless otherwise provided for. See Tidd's Supp. Archb. C. L. 17, (4th edit.)‖

(G) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

1. *How the Body of an Indictment at Common Law ought to set forth the Substance and manner of the Fact.*

An indictment, as defined by my Lord Hale, is nothing else but a plain, brief, and certain narrative of an offence committed by anv person, and of those necessary circumstances that concur to ascertain the fact, and its nature, in which, in favour of life, great (*a*) strictnesses have at all times been required.

2 Hal. Hist. 169. (*a*) To that degree as to become the disease and reproach of the law. 2 Hal. Hist. P. C. 193.——That before the 4 G. 2, c. 26, and 6 G. 2, c. 14, all parts of it ought to be in Latin, and how far it was vicious for false or improper Latin, vide 2 Hawk. P. C. {Every indictment ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and except in particular cases where precise technical expressions are required to be used, there is no rule that other words should be employed than such as are in ordinary use, or that a different sense should be put upon them than what they bear in ordinary acceptation. And if the meaning of any word be ambiguous, but it is sufficiently marked by the context, or other means in what sense it is intended to be used, it shall be so understood, and no objection can be made on the ground of repugnancy. Thus the word *until* will bear an exclusive and an inclusive meaning; and it will receive the one or the other construction according as the context and subject matter of the indictment may require, in order to make the whole consistent and sensible. 5 East, 244, 259, The King v. Stevens and Agnew.}

And therefore it is laid down as a good general rule, that in indictments, as well as in appeals, the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone upon insufficient premises.

Cro. Eliz. 147, 201; 2 Hawk. P. C. c. 25, § 57.

Hence it hath been holden, that no periphrasis, or circumlocution whatsoever, will supply those words of art which the law hath appropriated for the description of the offence; as *murdravit* in an indictment of murder, (*b*) *cepit* in an indictment of larceny; *mayhemavit* in an indictment of *mayhem;* (*c*) *felonicè* in an indictment of any felony whatsoever; *burglaritèr*, or *burgularitèr*, or else *burgalaritèr*, in an indictment of burglary (*d*); *proditoriè* in an indictment of treason; *contra ligeantiæ suæ debitum* in an indictment of treason against the king's person.

2 Hawk. P. C. c. 25, § 55, and several authorities there cited. 2 Hal. Hist. P. C. 183, 184, accordingly. (*b*) And therefore an indictment against A, *quod felonicè abduxit unum equum*, without saying *cepit et abduxit*, is not good, for he might have the horse by bailment, and then it is no felony. 2 Hal. Hist. P. C. 184. (*c*) For if A is indicted, that *furatus est unum equum*, it is but a trespass, for want of the word *felonicè*. 2 Hal. Hist. P. C. 184. {A felony cannot be indicted as a misdemeanor. 1 Ld. Ray. 711, Rex v. Cross; 8 Mod. 264, n., Rex v. Wild; Foster, disc. 3, ch. 3, s. 6; 3 Mass. T. Rep. 254, 258, Commonwealth v. Macombor.} (*d*) In petit treason it must be laid *felonicè et proditoriè;* for though the party be acquitted of the petit treason, he may be convict of the manslaughter or murder. 2 Hal. Hist. P. C. 184. {The omission of the technical words *feloniously*, *wilfully*, &c., in an indictment for murder, as applied to the manner of killing, is fatal. Respublica v. Honeyman, 2 Dall. 228.}

But in an indictment, or appeal of rape, the same is sufficiently set forth by the words *felonicè rapuit*, without adding (*e*) *carnalitèr cognovit*, or setting forth the special manner of the terror or violence, and then concluding that the defendant *sic felonicè rapuit.*

2 Hawk. P. C. c. 25, § 56. (*e*) But an indictment of rape, *quod felonicè et carnaliter cognovit*, without the word *rapuit*, is not good, though it conclude *contra formam statuti*. 2 Hal. Hist. P. C. 184.

(G) What ought to be the Form of the Body, &c.

And from this certainty required in indictments, it hath been holden, that an indictment for a felonious breach of prison, without showing the cause of the imprisonment, is not good.

2 Hawk. P. C. c. 25, § 57.

So, of an indictment for refusing to serve the office of constable, being *legitimo modo electus*, without showing the manner of the election.

Allen, 78; Mod. 24; 5 Mod. 96, 129.

So, it hath been adjudged, that an indictment of burglary is insufficient, without showing that it was *noctanter*.

9 Co. 66 b; ß State of Vermont v. Mather, Chipm. 32. ∂

Also it is agreed, that an indictment, charging a man with a nuisance, in respect of a fact which is lawful in itself, as the erecting of an inn, &c., and only becomes unlawful from particular circumstances, is insufficient, unless it set forth some circumstances that make it unlawful.

2 Roll. Rep. 345; Palm. 368, 374.

So, it hath been adjudged, that an indictment for traitorously coining alchymy like to the king's money, without showing what money, viz.: whether gold, silver, or copper, is insufficient; for as to the latter of these, the offence could not amount to treason.

2 Hawk. P. C. c. 25, § 57.

So, an indictment of perjury not showing in what manner, and in what court, the false oath was taken, is insufficient; because, for ought appears, it might have been extrajudicial.

Cro. Eliz. 137.

But an indictment of extortion, charging J S with the taking of 50*s*. as a bailiff of a hundred *colore officii*, without showing for what he took it, is good, at least after verdict; for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise expressed. But this seems to be a special case.

Sid. 91; 2 Hawk. P. C. c. 25, § 57.

An indictment charging a man disjunctively is void; as *murdravit, vel murdrari causavit*, or that *A verberavit B vel verberari causavit*, or that *A fabricavit talem chartam, vel fabricari causavit*, &c., for here are distinct offences, and it appears not of which of them the party is accused.

5 Mod. 137, 138; Salk. 371; 2 Hawk. P. C. c. 25, § 58; R. v. Flint, Ca. temp. Hardw. 370; R. v. Stoughton, 2 Str. 900.

Also, an indictment accusing a man in general terms, without ascertaining the particular fact laid to his charge, is insufficient; for no one can know what defence to make to a charge which is uncertain; nor can he plead it in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him; nor can it judicially appear to the court what punishment is proper for an offence so loosely expressed.

Lev. 203; Keb. 278; Show. 389; 2 Hawk. P. C. c. 25, § 59; 4 Mod. 100; 3 Salk. 198; Comb. 193; Carth. 226; Holt, 363.

As, where the indictment charges the party with having spoken divers false and scandalous words against J S being mayor of A, &c., or with being a common defamer, vexer, and oppressor, &c., or with being a common disturber of the peace, and having stirred up divers quarrels among his

neighbours; or with being a person of evil behaviour, a common deceiver, a common publisher of the king's secrets, &c., or with being a common forestaller, a common thief, a common champertor, &c.

2 Hawk. P. C. c. 25, § 59, and several authorities there cited.

But barratry being an offence of a complicated nature, consisting in the repetition of frequent acts, all of which it would be too prolix to enumerate, experience has settled it to be sufficient to charge a man in general as a common barrator.

2 Hawk. P. C. c. 25, § 59, vide tit. *Barretry*.

And for the same reason an indictment against a common scold is sufficient, without showing any particulars.

2 Hawk. P. C. c. 25, § 59.

Neither is it necessary for an indictment of either of these two last-mentioned offences to conclude *in nocumentum omnium ligeorum*, &c., for it appears, from the nature of the thing, that it could not but be so.

2 Hawk. P. C. c. 25, § 59; R. v. Cooper, 2 Str. 1246, *contr.* as to a scold.

‖In an indictment for a conspiracy, it is sufficient to state the conspiracy and its object, without setting forth particularly the means used; as, where the indictment charged that the defendants had conspired together by *indirect means* to prevent one H B from exercising the trade of a tailor, but did not state what those means were.

R. v. Eccles, Willes's Rep. 583, n. a.

So in an indictment on st. 37 Geo. 3, c. 70, it is sufficient to charge the defendant with *having endeavoured* to seduce persons serving in his majesty's forces by sea or land from their allegiance, and to incite them to mutiny, without setting forth the means employed.

R. v. Fuller, 1 Bos. & Pull. 180.‖

An indictment must lay the charge against the defendant positively, and not by way of recital, as with a *quod cum*, &c., and it must expressly allege every thing material in the description of the substance, nature, and manner of the crime; for no intendment shall be admitted to supply a defect of this kind.

Salk. 371; Cro. Ja. 20; 4 Co. 42; 5 Co. 150; 2 Hawk. P. C. c. 25, § 60; 2 Lord Raym. 1363.

Therefore, if an indictment of murder want the words *ex malitiâ præcogitatâ*, it is no answer that it has the words *felonicè murdravit*, which imply as much.

Dyer, 99, pl. 63; 3 Hawk. P. C. c. 25, § 60.

So, if an indictment of death want an express allegation that the party received the hurt laid as the cause of his death, and also that he died thereof, no implication will help it.

2 Hawk. P. C. c. 25, § 60.

Also, if an indictment for feloniously breaking a prison, and commanding J S there imprisoned, &c., to escape, do not expressly allege that J S did escape, it is no answer that it is fully implied in calling the offence a felonious breaking.

Keilw. 87; 2 Hawk. P. C. c. 25, § 60.

Yet strained and over-nice exceptions of this kind are not to be regarded; as that an indictment of death, laying the assault to have been with malice prepense, doth not expressly repeat it in the clause immediately following,

and joined with a copulative, showing the giving of the wound at the same time and place.

4 Co. 41; 2 Hawk. P. C. c. 25, § 60. {Vide 2 Dall. 228, Respublica v. Honeyman.}

Or that an indictment setting forth that J S was lawfully arrested by virtue of a plaint before such a sheriff, &c., doth not expressly show that there was a good warrant.

Cro. Ja. 473; 2 Hawk. P. C. c. 25, § 60.

Or that an indictment setting forth an arrest in such a parish and ward in London, by virtue of a warrant to arrest the party within the liberties of London, doth not expressly lay such parish and ward within the liberties of London.

9 Co. 67; 5 Co. 150; 2 Hawk. P. C. c. 25, § 60.

Or that an indictment finding that J S *existens* of such a trade, &c., as will bring him within the law whereon the indictment is founded, committed such a fact, does not expressly allege that he was of such a trade, &c., at the time of the fact; for it fully appears from the natural construction of the participle *existens* going before the verb, to which it is the nominative case.

Cro. Ja. 610; 2 Mod. 128; 2 Roll. Rep. 226; Moore, 606; 2 Lev. 229; Raym. 378; Keb. 852.

Yet it is a good exception to an indictment of forcible entry, finding that A disseised B of such land *existens liberum tenementum* of B that it is not expressed at what time it was his freehold; for it stands indifferent, according to the common rules of construction, whether it was his freehold at the time of the disseisin, or at the time of finding the indictment, the word *existens* being applied only to the thing which was the subject of the action, and not being the nominative case of the verb, as in the former case.

Cro. Ja. 610; 2 Roll. Rep. 226; 2 Lev. 229; 2 Mod. 129; 2 Hawk. P. C. c. 25, § 61; Lord Raym. 610.

If one material part of an indictment be repugnant to another, or if the fact as laid be impossible or absurd, the indictment is void; as, where one is indicted for having forged a writing, in which A was bound to B, which is impossible if the writing were forged; or for having disseised J S of land, wherein it appears, by the indictment itself, that he had no freehold whereof he could be disseised; or for having entered peaceably on J S and then and there forcibly disseised him; or for having disseised him of land then being, and for ever since continuing to be, his freehold; or for having murdered J S at B, where by the indictment it appears that J S was only wounded at B and died at C; or for selling iron with false weights and measures, which is not only absurd, as supposing that iron could be sold by measure, but inconsistent, in supposing that it was so sold, and yet at the same time sold by weight; or for being absent from church six months, between such and such a time, which appears to have contained only the space of eleven days; or for feloniously cutting down trees, &c. Yet, where the sense is clear, a small impropriety may be dispensed with; as where one is indicted for having mowed *unam acram fœni*, which is said to be sufficient, and yet, that which was mowed could not, at the time of the mowing, in strictness be called hay, but grass only.

2 Hawk. P. C. c. 25, § 62, and several authorities there cited.

Also, a repugnancy in an indictment in setting forth the offence of the accessory, is as fatal as it is in setting forth that of the principal as, where

an indictment of death having laid the stroke on one day, and the death on another, charges the accessory with having abetted the principal at the time of the felony only.

2 Hawk. P. C. c. 25, § 63.

But, where several are present and abet a fact, and one only actually does it, an indictment may, in the same manner as an appeal, lay it as done by the one, and abetted by the rest.

9 Co. 67; Plowd. 97.

But, if it barely charge a man with having been present, it is void, because a man may be innocently present.

2 Hawk. P. C. c. 25, § 64.

An indictment of J S as accessory to four by these words, *sciens ipsos quatuor feloniam prædict. fecisse apud B felonicè receptavit* without adding *eos*, is naught; for it appears not clearly how many of them he is charged to have received.

2 Hawk. P. C. c. 25, § 65.

Also, an indictment of a constable for having voluntarily and feloniously suffered a person arrested by him on suspicion of felony to escape, without showing what the felony was, and that it was actually committed, is said to be void for the uncertainty: but an indictment for knowingly suffering persons convicted of felony to escape, is said to be good, without finding expressly what the felony was, or that it was committed, if the record of conviction be set forth with convenient certainty; for that shows what the felony was, and that it was committed.

2 Hawk. P. C. c. 25, § 66; [R. v. Freeman, 2 Str. 1266.]

It is holden by some, that an indictment finding that J S *scientèr receptavit* J D being a felon, is not good, without expressly finding that he knew him to be a felon; but by others, such indictment is good,(*a*) because the plain construction of the word *scientèr* carries it through the whole sentence.(*b*)

2 Hawk. P. C. c. 25, § 66, and the authorities there cited. (*a*) ‖ See acc. R. v. Fuller, 1 Bos. & Pull. 180; R. v. Lawley, 2 Str. 904; Fitz. 122, 263, S. C.‖ (*b*) *Sciens* that, &c., a sufficient averment. Stra. 904.

‖ By 7 G. 4, c. 64, § 20, it is enacted, "that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versâ*, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue where the court shall appear, by the indictment or information, to have had jurisdiction over the offence."‖

(G) What ought to be the Form of the Body, &c.

2. *How the Indictment must set forth the Persons mentioned or referred to in it.*

The name and addition of the party indicted ought regularly to be inserted, and inserted truly, in every indictment; but, if the party be indicted by a wrong Christian name, surname, or addition, and he plead to that indictment not guilty, or answer to that indictment upon his arraignment by that name, he shall not be received after to plead a misnomer or falsity of his addition; for he is concluded and estopped by his plea by that name, and of that estoppel the jailer and sheriff that do execution shall have advantage.

2 Hal. Hist. P. C. 175. β An indictment which does not set forth the estate, degree or mystery of the traverser may be quashed. State v. Hughes, 2 Harr. & M'H. 479. But when the name of the prisoner is unknown, and he refuses to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before the justices by the keeper of the prison is sufficient. Rex v. ———, R. & R. C. C. 489.γ ‖ If in an indictment for a misdemeanor the defendant plead a misnomer in abatement, on which issue is joined, and found against him, he cannot afterwards plead over to the charge. R. v. Gibson, 8 East, 107.‖

But it is said, that an indictment that the king's highway in such a place is in decay, through the default of the inhabitants of such a town, is good without naming any person in certain.

2 Roll. Abr. 79; 2 Hawk. P. C. c. 25, § 68.

Also it is said, that no indictee can take any advantage of a mistaken (*a*) surname in the indictment, either by plea in abatement, or otherwise, notwithstanding such surname have no manner of affinity with his true one, and he was never known by it.

2 Hawk. P. C. c. 25, § 68. (*a*) But *per* Hale, it is the safest way to allow his plea of misnomer, both as to his surname and as to his Christian name; for he that pleads misnomer of either, must in the same plea set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may be presently amended by the grand jury, and returned according to the name he gives himself. 2 Hal. Hist. P. C. 176. ‖ That an indictee for a misdemeanor may plead a misnomer in his surname in abatement, see R. v. Shakespeare, 1 East, 83. R. v. Sherman, Ca. temp. Hardw. 303.‖

And in this respect an indictment (*b*) differs from an appeal, whereof it is certain that a misnomer of a surname may be pleaded in an abatement as well as any other misnomer whatsoever.

2 Hal. Hist. P. C. 176; 2 Hawk. P. C. *ubi supr.* (*b*) But that every other misnomer of the defendant, as also every defective addition, are as fatal in an indictment as an appeal, vide 2 Hawk. P. C. c. 25, § 69.

Not only the misnomer of the name of baptism will abate an indictment, but also the naming of the defendant, knight, &c., who is a baronet, and no knight, &c., or the omission of a name of dignity, as, where Garter King at Arms is not named Garter in the indictment; and so of any other name of of dignity,(*c*) if process of outlawry lie upon it.

2 Hawk. P. C. c. 25, § 69, and several authorities there cited. (*c*) But an indictment against a peer of the realm is good without an addition, because no process of outlawry lies against him. Cro. Eliz. 148, Lord Dacre's case; 2 Hal. Hist. P. C. 177.

By the common law the party indicted could not take advantage of a misnomer, or the want of addition, because the fact being sworn against the party present, and appearing to their view, there could be no injury by the misnomer: also, as felons generally go by no certain name, and have no fixed habitation, it was thought hard to find out their real names or professions. But this was altered by the statute 1 H. 5, c. 5, which requires that in all indictments, &c., the party indicted ought to have the addition of his mystery, degree, place, and county.

2 Hal. Hist. P. C. 176.

(G) What ought to be the Form of the Body, &c.

The additions required by the statute are, that of his degree, as *yeoman*, *gentleman*, *esquire;* of his mystery, as *husbandman*, *sailor*, *spinster*, &c., therefore, if the addition be only general, as servant, farmer, citizen, &c., or of crimes and misdemeanors only, as extortioner, vagabond, heretic, &c., these are no good additions.

2 Hal. Hist. 176. But for this vide 2 Hawk. P. C. c. 25, § 70. β See State v. Newmans, 2 Car. & R. 74.γ

The addition ought to be to the substantive name, and not to that which comes after the *alias dictus*, because regularly the addition refers to the last antecedent.

2 Hal. Hist. P. C. 177; 2 Hawk. P. C. c. 25, § 70.

If several persons be indicted for one offence, misnomer, or want of addition of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in law as several indictments; and so in trespass.

2 Hal. Hist. P. C. 177. But in 2 Hawk. P. C. c. 25, § 70, it is said that where several are indicted, and there is an omission of an addition as to one, it makes the indictment vicious as to all; for which is cited 1 Bulstr. 183. But see R. v. Sherman, Ca. temp. Hardw. 303, *contr.*

Not only the defendant, but regularly all other persons also mentioned in an indictment, must be described with convenient certainty; and therefore, it seems to be generally agreed at this day, that an indictment for suffering divers bakers to bake, &c., against the assize; or for distraining divers persons without cause; or for taking divers sums of money of divers persons for such a toll, &c., without naming any bakers, &c., in particular, is insufficient.

2 Hawk. P. C. c. 25, § 71.

But an indictment of murder *cujusdam ignoti* is good; and so, for stealing the goods *cujusdam ignoti;* so, of an assault *in quendam ignotum;* and if the party be acquitted or convicted, and be afterwards indicted for an assault or murder of such a man by name, he may plead the former conviction or acquittal, and aver it to be the same person.

Plowd. 85 b; Dyer, 285 a; 2 Hal. Hist. 181; 2 Hawk. P. C. c. 25, § 71.

But an indictment *quod invenit quendam hominem mortuum, ac felonicè furatus est duas tunicas*, without saying *de bonis et catallis cujusdam ignoti*, is not good.

Hal. Hist. 181.

If the goods of a chapel be stolen, the indictment shall say *bona et catalla capellæ in custodiâ præpositorum;* if it be done in time of vacation, *bona et catalla capellæ tempore vacationis;* but, if the goods of a parish church be stolen, as the bell, the books, &c., it shall run *bona parochianorum de S in custodiâ guardianorum ecclesiæ*, and shall not suppose them *bona ecclesiæ*

2 Hal. Hist. P. C. 181.

If the goods which A hath as executor of B be stolen, the offender may be indicted *quod bona testatoris in custodiâ A executoris ejusdem* B or it may be general *bona ipsius* A.

2 Hal. Hist. P. C. 181. β If the stolen property is laid as belonging to a person who is deceased, judgment will be arrested. State v. Davis, 2 Car. Law Rep. 291.γ

If A dying be buried, and B open the grave in the night-time and steal the winding-sheet, the indictment cannot suppose it the goods of the dead man, but of the executors, administrators, or ordinary, as the case falls out.

2 Hal. Hist. P. C. 181.

(G) What ought to be the Form of the Body, &c.

An indictment *quod felonice, &c. cepit quandam peciam panni cujusdam* J S without saying *de bonis et catallis cujusdam* J S was therefore quashed.

Cro. Eliz. 490; 2 Hal. Hist. P. C. 182.

There is no need of an addition of the person robbed or murdered, &c., unless there be a plurality of persons of the same name; neither then is it essential to the indictment, though sometimes it may be convenient, for distinction-sake, to add it; for it is sufficient if the indictment be true, viz. that J S was killed or robbed, though there are many of the same name.

2 Hal. Hist. P. C. 182.

And it hath been adjudged, that an indictment of an assault on John, parish-priest of D, in the county of C, is good without mentioning his surname; for the certainty of the person sufficiently appears.

Keilw. 25; Dyer, 285, pl. 38; 2 Hawk. P. C. c. 25, § 72.

But it seems, that if such indictment had only described him by his name of baptism without any farther addition, it had been too uncertain. Yet the contrary seems to be holden in (*a*) Moore: However, it seems agreed, that a repugnancy or absurdity in the description of the person injured will vitiate an indictment: as, where one is indicted for stealing *bona prædict.* J S where no J S was mentioned before.

2 Hawk. P. C. c. 25, § 72. (*a*) Moore, 466.

It is not necessary to allege in an indictment of death, that the party killed was in the peace of God, and of the lord the king. (*b*)

2 Hawk. P. C. c. 25, § 73. (*b*) ‖ It is not improbable that this expression, that the person murdered was "in the peace of God, and of our lord the king," may have taken its rise from the institution of *the peace or truce of God;* though at present it has no such meaning, nor indeed, as it would seem, any meaning at all.‖

β On an indictment for forging a check, drawn in the name of a copartnership firm, or the president, directors, and company of a bank, it is not necessary to set out the names of all persons who compose the firm, or the banking company.

The People v. Curling, 1 Johns. 320.

An indictment for a riot in pulling down a dwelling-house, as well as for burglary, must set forth correctly whose house it is, and if it charge the dwelling as belonging to A, and A is a feme covert, a new trial will be granted.

State v. Martin, 2 Murph. 533.

In an indictment for stealing a horse, when it was laid as the property of Stephen *Harris*, and it appeared that the owner's name was *Harrison*, but that he sometimes was called *Harris;* held sufficient to maintain the indictment.

State v. France, 1 Tenn. R. 434.

An indictment for stealing pipes fixed to the dwelling-house of A and B, it appearing that the house was let in separate parts to A and B, held not sustainable.

R. v. Finch, 1 Ry. & M. 418.

Where the prosecutor's wife was employed to sell her husband's goods, and she received a note which was stolen from her before she reached home; held, that it was properly described as the husband's property.

R. v. Roberts, 7 Car. & Payn. 485.

An illegitimate child, six weeks old, was baptized by the name of E, after

which for a few days only it was called by the name of baptism and its mother's name; held sufficient evidence to go to the jury, whether it had acquired by reputation its mother's name, and to warrant their finding it properly described in the indictment.

R. v. Evans, 8 Car. & Payn. 765.*g*

‖ By the 7 G. 4, c. 64, in any indictment or information for felony or misdemeanor, wherein it shall be requisite to state the ownership of any property belonging to or in possession of partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to state it as the property of one of such partners, &c., "and another or others as the case may be."

And by § 15, property belonging to counties, ridings, &c., may be laid as belonging to the inhabitants, without specifying any of their names.

And by § 16, property provided for the use of the poor of any parish, &c., may be stated as belonging to the overseers of the poor for the time being. And materials for repairing the highways may be stated as belonging to the surveyors of the highways, for the time being, of the parish, &c.

And by § 17, property of turnpike trustees may be stated in any indictment as belonging to the trustees or commissioners of the road, without stating their names.

And by § 18, property, under the cognisance of commissioners of sewers, may be stated as belonging to the commissioners of sewers, without specifying their names.

And by § 19, no indictment shall be abated by reason of any dilatory plea of misnomer or want of addition or wrong addition, if the court shall be satisfied of the truth of such plea; but the court shall forthwith cause the information or indictment to be amended according to the truth, and shall call on the party to plead thereto.

Indictment against A, by addition of *servant*, is ill; but if A plead in abatement, he must give a better addition.

Rex v. Checketts, 6 Maule & S. 88.

Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But except in certain cases, where technical expressions having grown, by long use, into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation. Ambiguous, it shall be construed according as the context and subject matter require it to be, in order to make the whole consistent and sensible. The word "until" may, therefore, be construed either exclusive or inclusive of the day to which it is applied, according to the subject matter.

Rex v. Stevens, 5 East, R. 244.

Where a statute made it penal to exhibit lights to persons at sea within a particular half of the year, an allegation that the party exhibited lights on a particular day in a particular month within that half year, is sufficient.

Rex v. Brown, 1 Moo. & M. 163.

Where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved, though it be sufficient to allege it in the prefatory part of the indictment. But where the act is, in itself, unlawful, the law infers an evil intent; and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor.

Rex v. Philips, 6 East, R.464.‖

(G) What ought to be the Form of the Body, &c.

3. *How the Indictment ought to set forth the Thing wherein the Offence was committed.*

An indictment, which doth not with sufficient certainty set forth the thing wherein the offence was committed, is insufficient; as, where one is indicted for having forged a lease of certain lands, without naming some one certain parcel; or for having stolen *bona et catalla* J S without showing any in particular; or for having trespassed on two closes of meadow or pasture, or for having diverted *quandam partem aquæ* running from such a place to such a place, without any farther description: or for having engrossed *magnam quantitatem straminis et fœni*, or *diversos cumulos tritici*, without showing how much of each; or for having carried away *duas centenas casei*, without adding *libras* or *uncias*, *&c.*, or for having erected several cottages *contra formam statuti*, without showing how many.

2 Hawk. P. C. c. 25, § 74; 2 Hal. Hist. P. C. 182, accordingly. ℘ The matter which is the subject of the indictment must be correctly described. Commonwealth v. Smith, 1 Mass. 245; Commonwealth v. Richards, 1 Mass. 340; Commonwealth v. Hearsey, 1 Mass. 143; Commonwealth v. Stevens, 1 Mass. 203; Commonwealth v. M'Monagle, 1 Mass. 517; Commonwealth v. Morse, 2 Mass. 128; Commonwealth v. Ross, 2 Mass. 378; The People v. Rust, 1 Caines, 131; The People v. Pettit, 3 Johns. 511; United States v. Cantril, 4 Cranch, 167; United States v. Phelps, 4 Day, 469; Knowles v. The State, 3 Day, 103; State v. Avera, 2 Tayl. 237; State v. Ward, 2 Hawks, 443; State v. Farner, 1 Hawks, 487; State v. Martin, 2 Murph. 533; State v. Owen, 1 Murph. 452; State v. Street, 1 Murph. 156; State v. Holding, 1 M'Cord, 31; State v. O'Donnell, 1 M'Cord, 532; Commonwealth v. Hall et al., 15 Mass. 240; Commonwealth v. Knight, 12 Mass. 274; State v. Gustin, 2 South. 744; State v. Gibbons, 1 South. 40; Commonwealth v. Bangs, 9 Mass. 387; Montee v. Commonwealth, 3 J. J. Marsh. 133; State v. Jernigan, 3 Murph. 12; State v. Brown, 3 Murph. 322; State v. Waller, 3 Murph. 229; State v. Collins, 3 Hawks. 191; State v. Orrell, 1 Dev. 139; State v. Fitzgerald, 1 Dev. & Bat. 408. ℘

It is said to be most proper in indictments of larceny and trespass on a living thing to show to whom the property of it belonged, by calling it the ox or horse, &c., of J S, without using the words *bona et catalla:* yet there are many precedents in books of good authority, wherein this nicety is not observed.

2 Hawk. P. C. c. 25, § 75. {See 1 Bin. 201.}

If theft be alleged in any thing, the indictment must set down the value, that it may appear whether it be grand or petit larceny.

2 Hal. Hist. P. C. 183.

If the thing be movable, as a horse, cow, &c., it is said to be most proper to show its worth by the word *pretium;* but, if the thing be immovable, and consist of divers dead things, it ought to be *ad valentiam*, (*a*) yet this nicety seems not necessary. Neither is it clear that the worth of the thing stolen is required to be set forth in an indictment of larceny, for any other purpose, than to show that the crime amounts to grand larceny, and the better to ascertain the crime, in order for a restitution; or in an indictment of trespass, for any other purpose, than to aggravate the crime.

2 Hawk. P. C. c. 25, § 75. (*a*) And *per* Hale, this is but clerkship, and not substantial; for if *pretii* be set instead of *ad valentiam*, or *e converso*, it doth not vitiate the indictment; and so it is, if one *pretii* or *ad valentiam* be added to several things, where in true clerkship it should be applied severally, it is good if the party be convict of all. But possibly, if the party be convict but of part, it is not good, because it will be uncertain whether grand or petit larceny. 2 Hal. Hist. P. C. 183.

An indictment *quod felonicè cepit* 20 *oves*, *matrices*, *et agnos*, or *matrices et verveces*, is not good, because it doth not appear how many of one sort, and how many of another; but 20 *oves* generally might have been good

without distinguishing *matrices et verveces*, as in case of replevin or trespass.

2 Hale's Hist. P. C. 183; {1 East, 583.

But an indictment *de quatuor riscis et cestis*, *Anglicè* chests and coffers, is good, because synonymous.

2 Hal. Hist. P. C. 183, where it is said, that regularly the same or more certainty is required in an indictment of goods, than in trespass for goods.—And *note*, That it is agreed as a general rule, that if an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good for the residue. 2 Hawk. P. C. c. 25, § 74.——**Quia malè et negligenter se gessit in executione* of the office of constable, quashed for being too general. R. v. Winteringham, 1 Str. 2.——So, *De scriptis bonis et catallis* of Davila *decipiebant et defraudabant.* R. v. Powell, 1 Str. 8.——So, *Diversas quantitates cervisiæ.* R. v. Gibbs, 1 Str. 497. ——‖ So, for engrossing a great quantity of fish, geese, and ducks. R. v. Gilbert, 1 East, 583.‖ ——On an indictment upon 5 Eliz. c. 4, if it is averred, a trade used in Great Britain, instead of England, it is bad. R. v. Hotch, 1 Str. 552; R. v. Lister, 2 Str. 788.——An indictment must set out the words spoken of a justice of the peace in the execution of his office.——If for obstructing him, it must show by what act. R. v. How, 2 Str. 699.——An indictment for procuring by false tokens must specify them. R. v. Munoz, 2 Str. 1127.——[So, if by false pretences, R. v. Mason, 2 T. R. 581; and the truth of such of the pretences as the prosecutor would falsify, is to be negatived by special averments. R. v. Airey, 2 East, 30; R. v. Perrott, 2 M. & S. 379.]——An indictment for carrying a person with the small-pox, from one parish to another, must set forth that the defendant knew the person had the small-pox, and that it was with an ill intent. R. v. Bunce, Andr. 162.

ß In an indictment for high treason, it is sufficient to lay that the defendant sent intelligence to the enemy, without setting forth the particular letter or its contents.

Respublica v. Carlisle, 1 Dall. 35.

In Pennsylvania, it is not necessary, in an indictment for murder, to describe the offence so as to show whether it be murder in the first or second degree.

White v. Commonwealth, 6 Binn. 179.

In an indictment for murder, it was charged that the defendant with a certain stone, which he held in his right hand, in and upon the right side of the head of the deceased, feloniously did cast and throw, and that the said defendant with the stone aforesaid, so as aforesaid cast and thrown, the deceased in and upon the right side of the head feloniously did strike; held, that it was sufficiently alleged that the defendant threw the stone and struck the deceased with it.

White v. Commonwealth, 6 Binn. 179.

An indictment which charged the defendant with stealing three promissory notes for the payment of money, commonly called bank notes, "*on the bank of the United States*," held to be good.

M'Laughlin v. The Commonwealth, 4 Rawle, 464. See Commonwealth v. Boyer, 1 Binn. 201.

An indictment which charged that the defendant with force and arms unlawfully and wickedly did *attempt* to pick the pocket of one A B, with intent then and there feloniously to steal, &c., the goods and chattels of said A B, without laying an assault is too vague. (*a*) But where the indictment charged that the defendant, with intent to steal from the pocket, did assault A B, without stating the goods or money intended to be stolen, is sufficiently certain. (*b*)

(*a*) Randolph v. Commonwealth, 6 S. & R. 398. (*b*) Commonwealth v. Rogers, 5 S. & R. 463.

(G) What ought to be the Form of the Body, &c.

When in an indictment an instrument is set forth under an allegation that it was made "in the words and figures following," there must be a precise recital, the same as if the tenor had been alleged. (*a*) All that part of the bill, in such case, all that is evidence of the contract, must be set out truly and precisely, but the words in the margin, which are not part of the bill, need not be set out. (*b*)

(*a*) Commonwealth v. Stow, 1 Mass. 54. (*b*) Commonwealth v. Bailey, 1 Mass. 62; Commonwealth v. Stevens, 1 Mass. 203; The People v. Franklin, 3 Johns. Cas. 299.

In an indictment for forgery by altering a word in the conditon of a bond, it is sufficient to describe the date in the penal part of the bond, although the condition should have a different date.

Commonwealth v. Hearsey, 1 Mass. 143.

In an indictment for forging a promissory note, if the note be lost or destroyed, it is sufficient to set forth its substance, alleging the loss or destruction of the instrument.

The People v. Badgley, 16 Wend. 53.

In an indictment which charged the defendant with stealing a "gray horse," and the evidence is that it was a "gray gelding," the variance is fatal.

Hooker v. The State of Ohio, 4 Ohio, 350.

An indictment for breaking the dwelling, and "— sovereigns of the value," &c., "in the same dwelling-house then and there found and being, then and there feloniously did steal," &c., held sufficient.

Reg. v. Andrews, 1 Carr. & M. 121.

Ingots of tin or bars of iron held properly described as — lbs. of tin or iron; *aliter*, when the article has obtained a particular name, and by which it is known.

Reg. v. Mansfield, 1 Carr. & Marsh. 140.

In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe either the length, breadth, or depth of the wound.

Rex v. Tomlinson, 6 C. & P. 370.

In an indictment for manslaughter, it is not requisite to allege the causes, merely natural, which conducted to the death of the party.

Rex v. Webb, 1 Mo. & Rob. 405.*g*

4. *How the Indictment must set forth the Circumstances of Time and Place.*

It is laid down as an undoubted principle in all the books that treat of this matter, that no indictment whatsoever can be good without precisely showing a certain year and (*c*) day of the material facts alleged in it.

2 Hawk. P. C. c. 25, § 77, and several authorities there cited. *β* State v. Haney, 1 Hawks, 460.*g* See also R. v. Holland, 5 T. R. 607; R. v. Haynes, 4 M. & S. 214. *β* It is requisite that a day certain should be laid in the indictment, charging that the offence was then committed; but the prosecutor may give evidence of an offence committed on any other day, previous to the finding of the indictment. Jacobs v. The Commonwealth, 5 S. & R. 316; State v. G. S., 1 Tyl. 295.*g* And this the law requires, not only because the party may be the better prepared to make his defence, but also because that in indictments, on which, upon a conviction, there incurs a forfeiture of lands, it may appear to what day the forfeiture is to have relation; as also, that if it be an indictment of murder or manslaughter, it may appear that the death was within the year and day after the stroke. 2 Hal. Hist.

(G) What ought to be the Form of the Body, &c.

P. C. 179.——But it is not necessary upon the evidence to prove the crime to have been committed on the very day laid in the indictment; but, if it be proved to have been at any time before or after, the party is to be convicted. 2 Hal. Hist. P. C. 179. (*c*) But it is not necessary to mention the hour in an indictment, 2 Hawk. P. C. c. 25, § 76; unless the time of the day is material to ascertain the nature of the offence, and then it must be expressed; as in an indictment of burglary it ought to say, *tali die circa horam decimam in nocte ejusdem diei, felonicè et burglaritèr fregit;* yet it is said that by some opinions *burglaritèr* carries a sufficient expression that it was done in the night. 2 Hal. Hist. P. C. 179. So, upon breaking a house in the day-time, to oust the offender of his clergy upon the statute of 39 Eliz. c. 15, it is usual to add *tempore diurno;* for the statute expresseth it so; otherwise, though the indictment be good, yet he shall not be ousted of his clergy. 2 Hal. Hist. P. C. 179.

As, if an indictment of death laying the assault at a certain time, &c., do not repeat it in the clause of the stroke; or, if it do not set forth the time of the death, as well as of the stroke.

2 Hawk. P. C. c. 25, § 77; 2 Hal. Hist. P. C. 178.

So, if an indictment lay the offence on an impossible day, or on a day that makes the indictment repugnant to itself, or, if it lay one and the same offence at different days, it is insufficient.

2 Hawk. P. C. c. 25, § 77; *β* Pennsylvania v. M'Kee, Addis. 36.*γ*

As, if A be indicted *quod primo die Maii et secundo die Maii apud D*, he made an assault upon *B et quandam togam ipsius B adtunc et ibidem invent. felonicè cepit*, &c.; this indictment is not good, because there are several days mentioned before, and it is uncertain to which the felonious taking shall relate.

2 Hal. Hist. P. C. 178.

So, if A be indicted that he *Festo Sancti Petri anno* 20 Car., killed J S, this is not good; because there are two Feasts of St. Peter, and neither without addition, viz., *St. Peter ad Vincula*, and *St. Peter in Cathedrâ.*

2 Hal. Hist. P. C. 178.

The words *adtunc et ibidem* in the subsequent part of an indictment are as effectual, as if the year and day mentioned in the former part had been expressly repeated.

2 Hawk. P. C. c. 25, § 78.

Also, if it lay the fact on the Thursday after the Feast of Pentecost in such a year, or on the *Utas* of Easter, &c., (which shall be taken for the very eighth after the feast,) or on the 10th of March last, (being ascertained by the style of the sessions, &c.,) it is as good as if it had expressly named the day of the month, &c.

2 Hawk. P. C. c. 25, § 78.

Also, if an indictment charge a man with an omission, &c., as not scouring such a ditch, it needs not show any time.

2 Hawk. P. C. c. 25, § 79.

So, if an indictment charge a man with having done such a nuisance such a day and year, and on divers other days, it is void only as to the facts alleged on the days uncertainly set forth: but, if it charge a man generally with several offences at several times between such a day and such a day, without laying any one at a certain day, it hath been adjudged to be wholly void.

2 Hawk. P. C. c. 25, § 82.

(G) What ought to be the Form of the Body, &c.

Yet it hath been solemnly adjudged, that a conviction of deer-stealing, setting forth the offence between the 8th and 12th of July, &c., is sufficient.

2 Hawk. P. C. c. 25, § 82. ℘ An indictment for selling spirituous liquors by retail, *diversis diebus*, from a certain day to another day expressed, without license; whereas, the selling of some of the liquors specified in the indictment, during a portion of the time alleged, was not unlawful; yet a conviction under it was held well. Butman's case, 8 Greenl. 113. ℘

℘ An indictment is not defective merely by its being written with the usual initials and numerical figures for dates, as A. D. 1830, when the same are plainly legible.

State v. Hodgeden, 3 Verm. 481. See Bouv. L. D. *Figures*. ℘

And in these cases it is said to be most regular to set forth the year, by showing the year of the king; yet this may be dispensed with, for special reasons, if the very year be otherwise sufficiently expressed, for that only is material.

2 Hawk. P. C. c. 25, § 80.

℘ In an indictment for perjury, the day on which the offence was committed must be precisely stated.

United States v. Bowman, 2 Wash. C. C. R. 382; United States v. M'Neal, 1 Gallis. 387.

An indictment which charges that the offence was committed on the *first* of March, instead of the *first day* of March, is valid.

Simmons v. The Commonwealth, 1 Rawle, 142.

The bill was found on the second day of January, 1839; the endorsement of the plea of not guilty bore date the second of January, 1838; held, that this was a mere clerical error, and amendable.

Commonwealth v. Chauncey, 2 Ashm. 90.

In an indictment for a misdemeanor, the day and place named in the beginning refer to all the ensuing acts, and therefore need not be repeated.

Stout v. The Commonwealth, 11 S. & R. 177.

An indictment for burglary which alleges the crime to have been committed between the hours of twelve at night and nine of the evening succeeding, may be quashed for want of a *noctantur*.

State of Vermont v. Mather, Chipm. 32.

An indictment charged the offence to have been committed in November, 1801, and in the twenty-fifth year of American Independence, held, to be bad, because the offence was charged to have been committed in two different years.

State v. Hendricks, Conf. Rep. 369.

If an indictment charges an offence to have been committed on a day yet to come, it is as defective as if no day had been laid.

State v. Sexton, 3 Hawks, 184. ℘

Every indictment at common law must expressly show some (*a*) place wherein the offence was committed, which must appear to have been within the jurisdiction of the court in which the indictment was taken, and must be alleged without any repugnancy; for if one and the same offence be alleged at two different places; or at B aforesaid, where B was not before mentioned; or, if the stroke be alleged at A and the death at B, and the indictment conclude that the defendant *sic felonicè murdravit* the deceased at A, the indictment is void.

2 Hawk. P. C. c. 25, § 83. (*a*) Regularly the vill or hamlet and county must be

expressed in the indictment, and where the time must be repeated upon several acts done, regularly, the place also must be repeated, viz. *tunc et ibidem*. 2 Hal. Hist. P. C. 180. ℘ In cases of misdemeanors, the day and place named in the beginning, need not be repeated. 11 S. & R. 177.℘

So it is also, if it lay not both a place of the stroke and death, or, if any place so alleged be not such from whence a visne may come; as to which it hath been adjudged, that if a fact be alleged in a parish in London with some other addition which sufficiently ascertains it, or in the parish of St. Lawrence Jewry, it needs not show the ward.

2 Hawk. P. C. c. 25, § 83; 9 Co. 66.

Also, in some crimes no vill need be named; as upon an indictment of barratry, because a barrator is such everywhere, and it shall be tried *de corpore comitatûs*.

2 Hal. Hist. P. C. 180. [There are only two cases where it is necessary to lay a vill, viz. upon the statute of additions, and in an appeal of death, upon the statute of Gloucester, c. 9, R. v. Blower, Hill. 27 Geo. 2, B. R. cited by Dennison, J., in 1 Burr. 337.]

Suff., in the margin, the indictment supposing a fact done *apud S. in com. prædict.* is good; for it refers to the county in the margin.

2 Hal. Hist. P. C. 180; 3 P. Wms. 439.

But, if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premises of the indictment, the fact laid *apud S. in com. prædict.* vitiates the indictment, because two counties are named before, and it is uncertain to which it refers.

Cro. Eliz. 739; 2 Hal. Hist. P. C. 180.

Indictment against A B, that he *apud N. in com. prædict.* made an assault upon C D of *F. in com. prædict. et ipsum adtunc et ibidem cum quodam gladio, &c., percussit, &c.*, this indictment is not good, because two places named before; and if it refers to both, it is impossible; and if only to one, it must refer to the last, and then it is insensible.

2 Hal. Hist. P. C. 180.

[An indictment stating the defendant to be late of W, and laying the offence to be *at the parish aforesaid*, was holden not to be sufficiently certain.

R. v. Mathews, 5 T. R. 162.] ℘ An indictment laying the offence in the parish of B, held sufficient, although, for ecclesiastical purposes, that parish had been divided into several districts. Reg. v. Howell, 9 Car. & Payne, 437.℘

It hath been holden, that an indictment on a statute, prohibiting such and such persons to do such a thing, needs not show where the facts happened which bring the defendant within the prohibition; as, where it is enacted, that it shall be treason for a person born within the realm and in popish orders to remain here, &c., in which case it is said, that the indictment needs not show a visne for the (*a*) birth or ordination.

2 Hawk. P. C. c. 25, § 84. (*a*) But, if a man be indicted for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that it is in decay, it must be alleged where those lands lie. 2 Hal. Hist. P. C. 181.

℘ Where an offence was committed in the county of S, and after the commission of the offence the county was divided, and that part of the county in which the offence was committed is created a new county called W, the offence is indictable in the county of W.

The State v. Jones, 3 Halst. 307.℘

(G) What ought to be the Form of the Body, &c.

Also, a mistake in evidence of the place laid is in no case material, on not guilty pleaded, if the fact be proved in any other place in the county; but, if there be no such place in a county as that wherein an offence is laid in an appeal or indictment, all process thereon is void by the statutes of 9 H. 5, c. 1, and 18 H. 6, c. 12.

2 Hawk. P. C. c. 25, § 84.

‖ By st. 48 Geo. 3, c. 144, for the further protection of the oyster fisheries, it is enacted, § 8, that it shall be sufficient in any indictment under that act, or under the 31 Geo. 3, c. 51, "to describe, either by name or otherwise, the bed, laying, or fishery in which the offence shall have been committed, without stating the same to be in any particular parish; and where the offence is committed on the border of any county, so as to make it difficult to ascertain the county, such offence may be stated to have been committed in the county in which the indictment shall be preferred, being either the county in which the offence was committed, or the adjoining county."‖

5. *Where the Offence indictable may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one indictment.*

Although the offence of several persons cannot but be several, because one man's offence cannot be another's, but every man must answer for himself; yet, if it wholly arise from (*a*) a joint act, which is in itself criminal, as, where several join in keeping a gaming-house, or in deer-stealing, or maintenance, &c., the defendants may be indicted jointly and severally; as thus *quod custodiverunt et uturque eorum custodivit*, or jointly only; for it sufficiently appears, that if all are joined in such act, each must be guilty; and therefore some of them may be convicted, and some acquitted.

2 Hawk. P. C. c. 25, § 89. (*a*) So, if several commit a robbery, burglary, murder, &c., 2 Hal. Hist. P. C. 173. [So, if several act in concert together, and one of them, in the presence of the others, use a false pretence (by words) to obtain money or goods, they may all be indicted jointly. Young v. Regem, in error, 3 T. R. 98.]—And as several persons may be joined in the same indictment, so several offences committed by the same party may be joined in one indictment; as burglary and larceny; larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment. 2 Hal. Hist. P. C. 173; ℘ Stoops v. The Commonwealth, 7 S. & R. 491; United States v. Marchant, 4 Mason, 158; 1 Baldw. R. 81; 5 S. & R. 60; 12 Wheat. 480. ℘ [But in the case of felony, if it appear before the prisoner has pleaded, or the jury are charged, that he is to be tried for *separate* offences, the judge in his discretion may quash the indictment: or, if the judge do not discover it till after the jury are charged, he may put the prosecutor to make his election on which charge he will proceed. 3 T. R. 106.]

But, where the offence arises from a joint act which in itself is not criminal, but may be so by reason of some personal defect peculiar to each defendant, as, where divers follow a joint trade, for which the law requires a seven years' apprenticeship, in which case each trader's particular defect, and not the joint act, makes him guilty; it seems most proper to indict them severally, and not jointly, because each man's offence is grounded on a defect peculiar to himself.

2 Hawk. P. C. *ubi supra*; 2 Hal. Hist. P. C. 174, accordingly. ℘ An indictment charging an indefinite number of acts, each of which constitutes a specific offence, is bad. Updegraff v. Commonwealth, 6 S. & R. 10. ℘

And for this reason indictments have been quashed for jointly charging several defendants (*b*) for not repairing the streets before their houses; or for taking inmates; or for neglecting a day of fasting appointed by proclamation. And this is agreeable to the rule of law as to bringing actions on

penal statutes, wherein several defendants shall not be joined, except it be in respect of some one thing in which all are jointly concerned; as, where several join in a suit in the Admiralty on a contract on land, or in procuring or giving an untrue verdict, &c.

2 Hawk. P. C. *ubi supra*, and several authorities there cited. (*b*) So, an indictment against several officers, *quod colore separalium officiorum suorum separalitèr extorsivè ceperunt*, was quashed. 2 Hal. Hist. P. C. 174.

But yet, where A, B, C, and D were indicted for erecting four several inns *ad commune nocumentum*, it was ruled, that for several offences of the same nature, several persons may be indicted in the same indictment; but then it must be laid *separalitèr erexerunt*, and for want of that word (*separalitèr*) the indictment was quashed.

2 Hal. Hist. P. C. 174.

Also, it is said in Hale, to be common experience, that twenty persons may be indicted for keeping disorderly houses or bawdy-houses, and they are daily convicted upon such indictments; for the word *separalitèr* makes them several indictments.

2 Hal. Hist. P. C. 174, and in Hawkins, that in some books we find joint indictments against several persons for several offences; as recusancy, following a trade without serving an apprenticeship, mentioned without any exception on this account; therefore this matter doth not seem to be fully settled. 2 Hawk. P. C. c. 25, § 89.—* Several persons cannot be joined in one indictment for perjury. 2 Str. 921.—A wife or servant, joining with a stranger in the same murder, may be charged in one indictment, for if it conclude *felonicè proditoriè et ex malitiâ precogitatâ* &c., it is good for both, *reddendo singula singulis*. Fost. 329.*

‖ If four men steal goods in the county of A, and divide the spoil in that county, and then severally carry their shares into the county of B, the offence in the former county will be *joint*, and the parties may all be convicted of it in the same indictment; but in the latter county the offence will be *several*, and the subject of separate indictments.

2 Russ. 1151, case of Barnett and others, *cor.* Holroyd, J., Worcester Sum. Ass. 1818.‖

β Two defendants cannot be joined in one indictment for perjury.

Respublica v. Goss, 2 Yeates, 479.

When several separate offences of the same nature are charged in the same indictment, whether the offences be misdemeanors or felonies, the defendant cannot object to this either on demurrer or in arrest of judgment. In cases of felonies, however, the court may quash the indictment before plea, or, on the trial, compel the prosecutor to elect on which charge he will proceed.

Commonwealth v. Gillespie, 7 S. & R. 469; Harman v. Commonwealth, 12 S. & R. 69.

An indictment charging in the same count two distinct offences, one a capital offence, and the other a misdemeanor, is bad.

United States v. Sharp, 1 Pet. C. C. R. 131.

The act of incorporation of a turnpike road and bridge company made it the duty of the president and directors to keep the road in repair, and the neglect to do so was declared a misdemeanor in the president and directors for the time being; held, that an individual director might be indicted for such neglect, either separately or jointly with his co-directors, and on conviction might be punished separately, although the board consisted of seven members, and the concurrence of a majority was requisite to the doing a corporate act.

Kane v. The People, 9 Wend. 203.*g*

(G) What ought to be the Form of the Body, &c.

6. *Whether the Words* Vi et Armis *be in any Case necessary.*

At common law the words *vi et armis* were necessary in indictments for offences which amount to an actual disturbance of the peace, as rescouses and assaults, &c., but it seems that they were never necessary where it would be absurd to use them; as in indictments for conspiracies, slanders, (*a*) cheats, escapes, and such like, or for nuisances in the defendant's own ground, &c.

Cro. Ja. 473; 2 Lev. 221; Skin. 426; 2 Hawk. P. C. c. 25, § 90. (*a*) As in an indictment for cheating another *per quendam lusum Angl. vocat.* trick at cards; it was holden that it need not be laid *vi et armis*, because cheating is clandestine. Keb. 652. ℘ In an indictment for an arrest, it is not sufficient to allege that the defendants assembled with force and arms, and being so assembled, did, &c. without repeating that the acts were done with force and arms. Comm. v. Runnels, 10 Mass. 518. ℘

But, however material these words might have been by the common law, yet now it is enacted by 37 H. 8, c. 8, that the words *vi et armis*, *viz. cum baculis*, *cultellis*, *arcubis*, *et sagittis*, or such other like, shall not of necessity be put in any inquisition or indictment, nor shall the parties indicted have any advantage by writ of error, or plea, or otherwise, to avoid any such indictment or inquisition, for the want of these or the like words; but the said indictments, &c., lacking the said words, or any of them, shall be adjudged as effectual to all intents, constructions, and purposes, as the same indictments, &c., having the same words in them.

Yet since this statute, exceptions to indictments of trespass, and such like, for want of the words *vi et armis*, where they have not been implied by other words, as *rescussit manu forti*, &c., have sometimes prevailed; and the necessity of them is (*b*) said to be owing to this, that without them there can be no *capiatur* entered, nor fine to the king.

2 Hawk. P. C. c. 25, § 91. ℘ The words *vi et armis* are not essential in an indictment for murder. Territory v. M'Farlane, 1 Mart. (Lo.) R. 224. ℘ (*b*) 2 Lev. 221.

Yet, says Hawkins, they have been often overruled, and it is not easy to show how they ever could prevail since the said statute, consistently with the manifest purport of it: however, it is certainly safe and advisable to make use of them where they are proper and pertinent, if it be to no other purpose than to aggravate the offence.

2 Hawk. P. C. *ubi supra*, and herewith 2 Hal. Hist. P. C. 187, seems to agree. [The words *vi et armis* are implied in an indictment for a *riot*, in the words *riotosè ceperunt, fregerunt et prostraverunt.* R. v. Wynd, 2 Str. 834.]

7. *Whether it be necessary to lay the Words* contra Pacem.

In as much as all offences, which are punishable by a public prosecution, tend to the disturbance of the quiet and peaceable government of the king over his people, it seems a good (*c*) general rule, that all indictments and criminal informations ought to conclude *contra pacem* of the king, or kings, in whose reign, or reigns, the offence was committed.

2 Hawk. P. C. c. 25, § 92. (*c*) Every indictment ought regularly to conclude *contra pacem domini regis.* 2 Hal. Hist. P. C. 188.——And though it conclude *contra pacem*, yet if it be without *domini regis*, it is insufficient. 2 Hal. Hist. P. C. 188.——Though the offence be for using a trade, not having served an apprenticeship, yet it ought to conclude *contra pacem*; for every offence against a statute is *contra pacem*, and ought to be so laid. 2 Hal. Hist. P. C. 188. Yet *per* Hawkins, there are some precedents without this conclusion, but not warranted by any resolution, 2 Hawk. P. C. c. 25, § 92, except only where the indictment is for a bare non-feasance, as the not performing the order of justices of peace; which hath been resolved to be good, without this conclusion, in Vent. 108, 111. ℘ An indictment for a common law felony must contain a "*contra pacem.*" Rex v Cook, R. & R. C. C. 176; S. C. 2 Russ. on Cr. 172. ℘

(G) What ought to be the Form of the Body, &c.

Therefore, if A be indicted for an offence supposed to be committed in the time of a former king, and the indictment conclude *contra pacem domini regis nunc*, it is insufficient; for it must be supposed to be done *contra pacem* of that king in whose time it was committed.

2 Hal. Hist. P. C. 188, 189; R. v. Lookup, 3 Burr. 1903.

If an offence be supposed to be begun in the time of one king, and continued in the time of his successor, (as a nuisance,) it must conclude *contra pacem* of both kings, else it is insufficient.

2 Hal. Hist. P. C. 189.

As, if one be indicted for having erected a wear in the reign of Queen Elizabeth, and continuing it in the reign of King James, and the indictment conclude, that so it was erected and continued *contra pacem regis*, &c., without adding *contra pacem nuper reginæ*, it is insufficient, because the commencement of the wrong, which is as much indicted as the continuance, was in the reign of the queen: but it is said, that if the erection had been laid only by way of inducement, and the gist of the indictment had only been the continuance of it, such conclusion, *contra pacem* of the king only, might be good.

Yelv. 66, Sir John Winter's case; 2 Hawk. P. C. 243.

If an offence be alleged in the time of Queen Elizabeth, and the indictment taken in the time of King James, and it conclude *contra pacem nuper reginæ et domini regis nunc*, it seems good; and *domini regis nunc*, but surplusage, as well as in a count in trespass.

Cro. Jac. 377; 2 Hal. Hist. P. C. 189.

It seems clear, that neither informations *qui tam*, nor informations for an intrusion, or other wrong of a civil nature, done to the king's lands, goods, or revenues, need this conclusion.

2 Hawk. P. C. c. 25, § 92.

8. *Whether it be necessary to lay it* contra Coronam et Dignitatem Regis.

It is said in Hawkins, that the words *contra coronam et dignitatem regis*, are used in all the precedents in Coke's Entries, which lay the offence *contra pacem*, yet that they are omitted in Rastal's Precedents; and it hath been (*a*) resolved, that an indictment for a riot is good without them, nor can he find the contrary to have been adjudged any where.

2 Hawk. P. C. c. 25, § 94, and *per* Hale, an indictment need not conclude *et contra coronam et dignitatem ejus*, though it be usual in many indictments. 2 Hal. Hist. P. C. 188. (*a*) 2 Roll. Abr. 82; & State v. Anthony, 1 M'Cord, 285; State v. Washington, 1 Bay, 120.

9. *Whether it be necessary to lay it* in Contemptum Regis.

The words *in contemptum regis* are sometimes used in indictments of superior courts, and in informations of intrusion, and in actions upon statutes, and sometimes omitted; but there is no authority relating hereto, except in the Year-book of 4 H. 6, pl. 7, wherein it seems to be admitted, that it is necessary in an action on a statute.

2 Hawk. P. C. c. 25, § 95.

10. *Whether it be necessary to lay it* illicitè.

The word *illicitè* has been adjudged not to be necessary in an indictment for a riot, because the fact indicted appears to be unlawful; and the same

may be said to all other indictments at common law. But, if a statute in describing a thing prohibited uses the word *illicitè*, an indictment thereon is not good without it.

2 Hawk. P. C. c. 25, § 96.

11. *Whether a Defect in any of these Particulars be amendable.*

It is clearly agreed, that none of the statutes of amendment extend to criminal prosecutions, and therefore no indictment can be amended in any case wherein an amendment is not allowable by the common law.

2 Hawk. P. C. c. 25, § 97, *et* vide tit. *Amendment and Jeofail*, letter (C).

But it is said, that the body of an indictment from London may be amended, because by the city charters the tenor of the record only shall be removed from thence.

2 Hawk. P. C. c. 25, § 97.

Also, a coroner may, by rule, amend his inquest by the notes, in matter of form, before it is filed: and the caption of an indictment may, on motion, be amended by the clerk of the assizes, or of the peace, so as to make it agree with the original record, at any time during the term in which it came in, but not in a subsequent term.

2 Hawk. P. C. c. 25, § 97.

But it is said, that the caption of an inquisition shall never be amended after it is filed; for being part of, and drawn at the same time with the inquisition, greater exactness is required in it than in the caption of an indictment, which is left, as of course, to be drawn up as occasion shall require.

2 Hawk. P. C. c. 25, § 97.

Also, it seems to be settled, that a discontinuance in a criminal prosecution is not amendable, without consent. But it seems that a mere misprision in the joining of an issue, as where the words *similitèr*, &c., are omitted, is amendable at any time. Also, the direction of a *venire vicecomitibus* of B which is returned by J S *vice comiti*, may be amended on the oath of J S that there is but one sheriff of B, which is himself. Also, it is common practice to amend criminal informations, and the pleadings thereon, while all is in paper.

2 Hawk. P. C. c. 25, § 97.

And anciently, where an indictment appeared to be insufficient, the practice was, not to put the defendant to answer it; but, if it were found in the county in which the court sat, to award process against the grand jury, to come into court and amend it; and it is the common practice at this day, while the grand jury, which found a bill, is before the court, to amend it, by their consent, in matter of form, as the name or addition of the party.

2 Hawk. P. C. c. 25, § 98.

β An indictment concluding "against the peace of the state," may be so amended by the prosecuting attorney, with leave of the court, as to read "against the peace and dignity of the state."

Carn. v. The State, 4 Blackf. 512.γ

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

1. *Whether it be necessary that such Indictment recite the Statute whereon it is grounded.*

It seems to be agreed, that there is no necessity for any indictment or information on a (*a*) public statute, to recite such statute, whether the offence be *malum prohibitum*, or *malum in se;* or whether it be prohibited by more

than one statute, or by one only; for the judges must, *ex officio*, take notice of all public statutes; or, if there be any more than one, by which an indictment may be maintained, they will go upon that which is most for the king's advantage.

(*a*) 2 Hawk. P. C. c. 25, § 100, and several authorities there cited, 2 Hal. Hist. P. C. 172, S. P. accordingly. And all penal statutes that induce a forfeiture to the king, or make a felony or treason, are general statutes, because they concern the king. ℘ Commonwealth v. M'Curdy, 5 Mass. 324. It is not in general requisite, in an indictment for a statutable offence, to follow the exact wording of a statute; it is sufficient if the offence be set forth with substantial accuracy and certainty to a reasonable intendment. United States v. Bachelder, 2 Gallis, 15. ℘

2. *What Misrecitals of such Statutes are fatal.*

Although it be not necessary to recite a public statute; yet, if a prosecutor take upon himself to recite a statute, and materially vary from it, and conclude *contrà formam statuti* (*a*) *prædicti*, he vitiates the indictment; because it judicially appears that there is no such foundation as that whereon it is expressly grounded.

Plowd. 79, 83, 84; Cro. Eliz. 236, 245; Palm. 565; 4 Co. 48; 2 Hawk. P. C. c. 25, § 101. (*a*) But, if it conclude generally *contra formam statuti in hujusmodi casu edit et provis.*, it is good; for the court takes notice of the true statute, and will reject the misrecital as surplusage. 2 Hal. Hist. P. C. 172, 173; Keb. 662, S. P.

As, where in an indictment with such conclusion on the statutes which prohibit entries with strong hand, the word *vi* is put for *manu;* or, where *nuncia* is put for *mendacia* in an indictment on the statute of *scandalum magnatum;* or, where the verb put to express the principal act, wherein the offence consists, is neither classical nor legal Latin, &c.

2 Hawk. P. C. c. 25, § 101.

Yet the omission of a synonymous word having no farther meaning than those which are expressly recited; or the joining of words much of the same sense, as *malitiosè et contemptuosè* with a copulative, where the statute uses a disjunctive; or the using the singular number for the plural, or the plural for the singular, where the sense is the same, vitiates not an indictment: as, where in reciting a statute speaking of any suits in any courts, or of disturbers of persons in open preaching, the words *in aliquâ curiâ* or *in apertis prædicationibus*, are used.

2 Hawk. P. C. c. 25, § 102.

Also, it seems that no advantage can be taken of a variance from any part of a private statute without showing it to the court in (*b*) a proper manner; because otherwise such statute shall be taken to be as it is recited.

2 Hawk. P. C. c. 25, § 103. ℘ A variance between the language of the statute creating the offence and the indictment, will not vitiate the indictment, if the words used in such indictment are equivalent to those of the statute. State v. Hickman, 3 Halst. 299. ℘ (*b*) If a statute be particular, it must be recited in the indictment, and proved by an examined copy upon the trial. 2 Hal. Hist. P. C. 172.

A misrecital of the place or day whereon the parliament was holden, by which a public statute was made, on which the indictment is grounded vitiates the indictment; for the court takes judicial notice of all such statutes, and will not make good a proceeding, which, of the party's own showing, appears to be commenced on a supposed statute of this kind, where there is no such statute; as, if a parliament be summoned to meet on the twenty-third day of January, and before the meeting be prorogued to the twenty-fifth, and then holden, and a statute made by it be recited as made in a parliament holden on the twenty-third; or if a parliament, first holden in one

year be continued by prorogation to another, and then sit again, and a statute made at such sessions be recited, as made at a parliament holden or begun in such second year, which is all one, instead of saying, that it was made at a sessions of parliament, then holden, and the indictment conclude *contra formam statuti prædict.*, the variances in strictness are fatal. Yet faults of this nature may be helped by the constant course of precedents on a statute, or by concluding *contra formam statuti*, without adding *prædicti;* or, as some say, by the defendant's admittance that there is such a statute as is supposed; ‖though it will be difficult to maintain that the party's admittance of what the court judicially knows to be contrary to the truth can make good any indictment.‖

2 Hawk. P. C. c. 25, § 104.

Also, a repugnancy in setting forth the time when a parliament was holden is fatal; as, if a statute be recited to have been made in the first and second years of such a king; also, it hath been holden necessary to show in what county (*a*) the parliament was holden, but that the omission of the day is no fault.

2 Hawk. P. C. c. 25, § 104. (*a*) East v. Wilson, Cro. El. 106. But no reason is given for this opinion.

It seems not to be clearly settled, whether the misrecital of the title of an act be material; but it seems more clear, that a variance in reciting it, as commencing after the making, where it is to commence after the end of the sessions, is fatal.

2 Hawk. P. C. c. 25, § 105.

A variance no way altering the sense does no hurt; as, where in reciting an oath prescribed by statute, the words *sea of Rome*, are put for *see of Rome*, and *I do declare in conscience*, instead of *I do declare in my conscience.* Neither is it a material variance to omit or misrecite a branch of a statute no way relating to the present purpose, but put only by way of flourish and *ex abundanti.*

2 Hawk. P. C. c. 25, § 106. ß When a statute employs a general term, and afterwards more special terms, defining an offence, an indictment using the general term only, is bad, though it would in its meaning comprehend the special term. The State v. Plunket, 1 Stew. R. 11. ∂

Neither is the misrecital of the preamble of a statute material; where the substance of the purview is well recited; as where, in an action on the statute of hue and cry, the declaration recites the preamble, as speaking of the burning of houses, where the statute speaks of arsons generally, without mentioning houses; or where in an action of *scandalum magnatum*, the declaration, reciting the preamble of the statute, mentions only what relates to earls, &c., but, if an indictment on 8 H. 6, c. 9, § 6, in reciting the clause, which shows in what actions the party shall recover, after mentioning recoveries by verdict, omit the words, *or in other manner*, or recite the statute as giving the fine on a recovery by action *dicto domino regi;* where there is nothing to make good the word *dicto;* or recite the clause concerning the bringing an action, as saying, *if the party after such entry make a feoffment*, &c., where the words are, *if after such entry any feoffment be made;* or recite it thus, *if any person be put out and disseised*, where the words are *if any person be put out or disseised*, the variances have been adjudged fatal. Yet the last has been holden to be immaterial, because, though the words above mentioned are in the disjunctive, they have been always expounded in the copulative; and it seems questionable how far the other

variances will be holden fatal at this day: niceties of this kind not having been of late so much regarded as formerly.

2 Hawk. P. C. c. 25, § 107, 108.

The total omission of the clause, which gives the forfeiture, does not hurt; and it may be probably argued, that a misrecital of such clause, in putting the words *admitteret et forisfaceret*, for *amitteret et forisfaceret*, is immaterial; for the variance is in a word wholly nugatory, and the sense is complete without it. But, if the variance carries with it a material repugnancy, as, where the words *whoever shall do the same shall incur the pain*, &c., are thus recited, *whoever shall do the contrary shall incur the pain*, &c., it will be difficult to make it good.

2 Hawk. P. C. c. 25, § 109.

3. *How far it is necessary to bring the Offence indictable within the very Words of the Statute.*

It is a general rule, that unless the statute be recited, neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the offence within all the material words of the statute; as, if an indictment of rape omit the word *rapuit;* or an indictment of perjury on 5 Eliz. c. 9, omit the words *voluntariè et corruptè*, or an indictment for striking in a church on 5 & 6 E. 4, c. 4, omit the words *to the intent to strike;* or an indictment for forestalling on 5 & 6 E. 6, c. 14, do not expressly allege that the *goods were then coming to the market to be sold;* or an indictment on the same statute for engrossing, do not allege that the defendant *engrossed*, &c., *by buying*, &c.; or an indictment of treason in compassing the king's death, on 25 E. 3, stat. 5, c. 2, have neither the words *compass* nor *imagine*, &c.

2 Hawk. P. C. c. 25, § 110. [Where the words of a statute are descriptive of the nature of the offence, or the purview of the statute; or are necessary to give a summary jurisdiction, there it is necessary to specify in the particular words of such statute. *Per* Lord Mansfield, R. v. Pemberton, 2 Burr. 1037.] β An indictment grounded on a statute, must pursue the description of the offence as contained in such statute. Respublica v. Tryer, 3 Yeates, 451; Updegraff v. Commonwealth, 6 S. & R. 5.γ

Neither is it always sufficient to pursue the words of the statute, unless in so doing you fully, directly, and expressly allege the matter wherein the offence consists, without the least uncertainty or ambiguity; and therefore if an indictment of perjury on 5 Eliz. c. 9, setting forth that the party, *tacto per se sacro evangelio falsò deposuit*, do not directly show that he was sworn; or, if an information on 18 H. 6, c. 17, for not abating so much of the price of wine sold as the vessels wanted of the statute-measure, do not expressly show how much they wanted; or, if an indictment on the statute of usury, setting forth that the defendant took more than five in the hundred, do not show how much, it is insufficient.

2 Hawk. P. C. c. 25, § 111.

If the statute relate only to such and such persons particularly described by it, the indictment must bring the defendant within all such descriptions, unless they carry with them the bare denial of a matter, the affirmation whereof will be a proper natural plea for the defendant; as, where it is enacted, that all persons, having no reasonable excuse, shall go to their parish church, &c., in which case there is no need to allege in the indictment, that the defendant had no reasonable excuse; for this will more properly come into question from the plea. Neither is there any need, in order to bring a defendant within the description of a statute, to show where the

thing happened which brought him within it. Neither is it necessary, where you allege, that the defendant *existens* so and so, as the statute mentions, did the fact, to show any farther, that he was so at the time of the fact.

2 Hawk. P. C. c. 25, § 112; R. v. Baxter, 5 T. R. 83. ℘When in the enacting clause of an act, exceptions are enumerated, it will be necessary in an indictment under the act to negative the exceptions. Reynolds v. The State, 2 Nott & M'Cord, 365.℘

There is no need to allege in an *indictment* on a statute, that the defendant is not within any of its provisos, notwithstanding the purview expressly takes notice of them, as by saying, that none shall do the thing prohibited otherwise than in such special cases, &c., as are expressed in the act. But it is said, that a conviction on a penal statute ought expressly to show that the defendant is not within any of its provisos; for since the defendant has no remedy against such a conviction, but from a defect appearing on the face of it, it ought to have the highest certainty, and to satisfy the court that the defendant had no such matter in his favour, as the statute itself allows him to plead.

2 Hawk. P. C. c. 25, § 113.

If the statute whereon an indictment is founded, be particularly recited, and the substance of the fact, and the time and place, and things and persons concerned, be alleged with sufficient certainty, and a circumstance only omitted, the general conclusion, *contra formam statuti*, seems to help such omission.

2 Hawk. P. C. c. 25, § 114.

4. *Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.*

It was formerly holden, that no indictment grounded on a statute, and concluding *contra formam statuti*, could be maintained as an indictment at common law, if it were not maintainable as an indictment on some statute, because it appears that the prosecution is grounded on a foundation which will not support it; but the law is now taken to be otherwise; and accordingly it hath been adjudged, that on a special indictment on the statute of stabbing, the defendant may be found guilty of general manslaughter at common law, and the words *contra formam statuti* rejected as senseless.

2 Hawk. P. C. c. 25, § 115; R. v. Mathews, 5 T. R. 162. ℘An indictment concluding "contrary to the act of Assembly in such case made and provided," where the offence is prohibited by the common law only, is, nevertheless good. Respublica v. Newell, 3 Yeates, 407; Pennsylvania v. Bell, Addis. 171; Comm. v. Hoxey, 16 Mass. 385.℘

5. *How far it is necessary to conclude* contra Formam Statuti.

It seems to be agreed, that a judgment on a statute shall never be given on an indictment which doth not conclude *contra formam statuti;* and therefore if the fact indicted be an offence prohibited only by statute, and the indictment conclude not *contra formam statuti*, no judgment can be given upon it. For though an indictment, which is redundant, may be helped by rejecting what is senseless, an indictment that is defective in a material part can be no way supplied. But it seems, that a judgment on 8 H. 6, c. 9, may be given on a writ of assize of *novel disseisin*, brought in the common law form; but this depends upon a reasonable construction of the statute, which being express that the party may recover by such writ, but giving no new one, may be well intended to give the party a remedy by writ brought in the old form.

2 Hawk. P. C. c. 25, § 116. ℘See Commonwealth v. Rogers, 5 S. & R. 463,

(I) What ought to be the Form of a Caption, &c.

M'Cullough v. Commonwealth, Hardin, 95. When the indictment charges an offence created by statute, it is not sufficient to allege the same to have been committed "against the law in such case made and provided;" the conclusion must explicitly refer to the statute as the foundation of the prosecution. Comm. v. Stockbridge, 11 Mass. 279. But if an indictment founded on a statute conclude "contrary to the true intent and meaning of the act of Congress in such case made and provided," it is good, and equivalent to a conclusion "against the form of the statute in such case made and provided." United States v. La Coste, 2 Mason, 129.ℊ

If there be more than one statute concerning the same offence, the latter of which only continues the former, without making any addition to it, or only qualifies the method of proceeding upon it, without altering the substance of its purview, it is safe to conclude an indictment on it *contra formam statuti;* but, where the same offence is prohibited by several independent statutes, or a new penalty is added by a subsequent statute to an offence prohibited by a former, it is said to be safer to conclude *contra formam statutorum*, than *contra formam statuti.*

2 Hawk. P. C. c. 25, § 117. ℘ An indictment cannot be grounded on two acts of Assembly so as to bring the offence within both, when the acts are separate and distinct in their provisions. Updegraff v. The Commonwealth, 6 S. & R. 10. See State v. Jim, 2 Murph. 3.ℊ

℘ A conclusion of an indictment against the form of the statute in the singular, is sufficient in all cases, when the offence is distinctly within more than one independent statute.

United States v. Gibert, 2 Sumn. 19. See Kane v. The People, 9 Wend. 203.

When the statute regulates only the punishment, no averment *contra formam statuti* is requisite.

Rex v. Berry, 1 Moo. & Rob. 463.ℊ

*Facts done by virtue of an act containing a former one, expired, may be laid to be done by virtue of the original act.

R. v. Morgan, 2 Str. 1066.

Though the indictment be *contra formam statuti*, it is not necessary that the *certiorari*, *venire*, and *distringas*, express it.*

R. v. Hayes, 2 Str. 843; 2 Ld. Raym. 1518; 1 Barnardist. 31, 48, 142, 167.

℘ When a statute only inflicts on that which was an offence before, judgment may be given for the punishment prescribed therein, though the indictment does not conclude *contra formam statuti.*

Commonwealth v. Searle, 3 Binn. 332; Russell v. Commonwealth, 7 S. & R. 489.

When the duty of repairing public highways is enjoined on towns wholly by statute, an indictment against the town for neglect of this duty must allege the offence to be *contra formam statuti.*

Commonwealth v. The Inhabitants of Springfield, 7 Mass. 9.

Where an indictment concluded "contrary to the act of Assembly of the *state* of South Carolina," whereas the act under which the indictment was prosecuted, was an act of the *province* of South Carolina; held good.

State v. Turnage, 2 Nott & M'C. 158. See State v. Holly, 2 Bay, 262.ℊ

(I) What ought to be the Form of a Caption of an Indictment.

The caption of the indictment is no part of the indictment itself, but it is the style of the preamble, or return, that is made from an inferior court to a superior, from whence a *certiorari* issues to remove it; or when the whole record is made up in form; for whereas the record of the indictment, as it stands upon the file in the court wherein it is taken, is only thus, *Juratores*

(I) What ought to be the Form of a Caption, &c.

pro domino rege super sacramentum suum præsentant; when this comes to be returned upon a *certiorari* it is more full and explicit, viz.: Mich. *Ad generalem sessionem pacis tent. apud S. in com. prædict. 5 die Octobris anno regni, &c., coram A. B. C. D., et sociis suis justiciariis domini regis ad pacem dicti domini regis in com. prædict. conservand. necnon ad diversas felonias, transgressiones, et alia malefacta in eodem comitat. audiend. et terminand. assignatis, per sacrament. E. F. G. H., &c., proborum et legalium hominum comit. prædict. jurat. et onerat. ad inquirend. pro dicto domino rege et pro corpore comit. prædict. existit præsentatum.*

2 Hal. Hist. P. C. 165. ℘ See Pennsylvania v. Bell, Addis. 173. A caption to an indictment is requisite only when the court acts under a special commission. State v. Warden, 2 Tayl. 163. ℘

Every caption of an indictment must show that it was taken before a court which has a proper jurisdiction; and therefore if it show only that it was taken before J S, steward, without showing to whom he was steward, or in what court; or if the caption of an inquisition *super visum corporis* show only that it was taken before J S, mayor of London, without adding that he was coroner; or, if it barely call him coroner, without showing that he was such for the district in which the inquisition was taken, it is insufficient. But, if it show that he was a coroner in the county, it sufficiently shows that he was a coroner for the county; and if the caption of an indictment show that it was taken at the sessions of the peace of such a county, it sufficiently shows that such sessions was holden for the county. But, if it only show that it was holden in the county, it is said to be insufficient. So it is also, if it omit the clause *necnon ad diversas felonias*, &c., or, if it barely show that the indictment was taken at a sessions of the peace, without showing before whom, or without naming the justices, or showing for what place they were justices; or, if in describing them as justices *ad pacem*, &c., *conservand.* it omit the word *assignat.* Yet it hath been adjudged, that it is not necessary for the caption of an indictment taken at a general sessions of the peace, to style any of them of the *quorum*, because it sufficiently shows that some of them were such, by showing that the indictment was taken at a general sessions.

2 Hawk. P. C. c. 25, § 119, &c. ℘ If the caption of an indictment does not show distinctly the names and style of office of the judges composing the court to which it is presented, the indictment will be quashed. State v. Zule, 5 Halst. 348. ℘ 2 Hawk. P. C. c. 25, § 123.

The caption of an indictment *ad magnam curiam cum leta tent.* is insufficient; but, if it be *ad magnam curiam et ad letam*, or *ad vis. franci. pleg. cum cur. baron. tent.* perhaps it is sufficient; for since the court baron has no jurisdiction over criminal matters, and the caption in these last cases is not express that the indictment was taken at it, as it is in the first case, the court will intend that it was taken at the leet, which alone had power to take it.

2 Hawk. P. C. c. 25, § 124.

The not showing in the caption of an indictment at a leet, whether the court were holden by charter or prescription, is helped by the multitude of precedents.

3 Hawk. P. C. c. 25, § 125.

Every caption of an indictment ought to show that the indictors were of the precinct for which the court was holden, and that they were twelve in number, and that they found the indictment on their oaths. Also, some indictments have been quashed for an omission of the names of the jurors;

(K) Where it may be quashed.

and others, for want of the words *proborum et legalium hominum;* and others, for want of the words *adtunc et ibidem jurat. et onerat.;* and others, for want of the words *ad inquirend. pro domino rege et pro corpore comitatûs;* yet of late years exceptions of this kind have not been much favoured, especially, if the indictment were in a superior court, and that which is omitted be, in common understanding, implied in what is expressed.

2 Hawk. P. C. c. 25, § 126; ℘ The People v. Guernsey, 3 Johns. Cases, 265. ℊ

℘ If the caption of an indictment state the grand jurors to be "good and lawful men," it is sufficient without alleging that they are freeholders or householders.

Bonds v. The State, Mart. & Yerg. 143; Cornwell v. The State, Mart. & Yerg. 147. See State v. Rockafellow, 1 Halst. 332; The People v. Jewett, 6 Wend. 386; M'Clure v. The State, 1 Yerg. 260; Tipton v. The State, Peck's R. 308; State v. Hunter, Peck's R. 166; Dean v. The State, Mart. & Yerg. 127. ℊ

Every caption must show a certain day and year when the indictment was found, and must record it in the present tense; but if it describe the court as holden *die Martis et die Mercurii*, or on such a day in such a year of the king, without showing what king; or if it show the day and year in figures, which are not Roman,(*a*) it is insufficient; yet it needs not add the year of the Lord. And the multitude of precedents have made good the use of *extitit præsentat.* instead of *existit*, &c.

2 Hawk. P. C. c. 25, § 127. [Where the caption stated the sessions to be holden *ad festum Epiphanii* instead of *Epiphaniæ*, it was adjudged a fatal mistake. R. v. Warre, 2 Str. 698. So, where it stated it on an impossible day. R. v. Fearnly, 1 T. R. 316. An indictment taken at an adjourned sessions, must show when the original sessions began, to bring it within the time prescribed by the statute. R. v. Fisher, 2 Str. 865.] ℘ The caption is no part of an indictment, and judgment will not be arrested because the caption does not contain the day and term when the indictment was found. Territory v. M'Farlane, 1 Mart. (Lo.) R. 221. ℊ (*a*) 2 H. H. P. C. 170; 1 Str. 261. Andr. 146. (*b*) [A conviction may be in the past, as well as in the present tense. R. v. Hall, 1 T. R. 320.]

Every such caption must also show where the indictment was found, that it may appear to have been at a place within the jurisdiction of the court; and therefore if it set forth, that the indictment was taken at a sessions of the peace, holden for such a county at B, without showing in what county B lies, otherwise than by putting the county in the margent, it is insufficient. But, if an inquest of death be set forth as taken at B before the coroner of the liberty of B, it needs not express that B is within the liberty of B, for it cannot but be intended.

2 Hawk. P. C. c. 25, § 128. ℘ It is not requisite that it should appear in the caption of the indictment, in express terms, that the grand jurors were summoned and returned as such. The State v. Jones, 4 Halst. 357. ℊ

(K) Where an Indictment may be quashed.

By the common law, the judges may, in discretion, quash any indictment for any such insufficiency in the body or caption of it, as will make a judgment given on it against the defendant erroneous; but they are in no case bound so to do *ex debito justitiæ*, but may oblige the defendant to plead or demur. And this they generally do where the offence is of an enormous or public nature, or where the indictment has been removed by *certiorari*, and a recognisance for procuring the trial of it has been forfeited.

2 Hawk. P. C. c. 25, § 146. [Between quashing indictments and arresting the judgment, quashing is the strongest way; because they must be very grossly bad to have the court to destroy them at once. 1 Bl. Rep. 275.]

(K) Where it may be quashed.

*Indictment against six jointly and severally, for exercising a trade, quashed; for there ought to be distinct indictments.

R. v. Weston, 1 Str. 623; R. v. Tucker, 4 Burr. 2046.

ℬ The court will quash an indictment when it is plain no judgment can be rendered in cases of conviction, as when the day on which the offence was committed is not laid in the indictment.

State v. Roach, 2 Hayw. 352.𝒻

The court will not quash an indictment, because not laid *contra formam statuti*, but leave defendant to demur.

R. v. Brotherton, 2 Str. 702. ℬ The court will not quash an indictment except in a very clear case. Respublica v. Cleaver, 4 Yeates, 69.𝒻

The court cannot strike counts out of an indictment, for it is the finding of the grand jury.

R. v. Pewtress, 2 Str. 1026; Ca. temp. Hardw. 203.

The Court of King's Bench will quash an indictment at the quarter sessions for perjury at common law, for want of jurisdiction.

R. v. Bainton, 2 Str. 1088. [Wherever there is a manifest defect of jurisdiction, the indictment will be quashed. R. v. Williams, 1 Burr. 389.]

But it will not quash an indictment for a nuisance, but put defendant to demur.

R. v. Wigg, 2 Ld. Raym. 1163; R. v. Bishop, Andr. 220; R. v. Sutton, 4 Burr. 2116.

Indictment for words spoken to a justice, but not laid to be spoken to him in the execution of his office, quashed.

R. v. Leap, Andr. 226.

But the court would not quash an indictment for not attending a mayor to execute his warrant, but left the defendant to demur to it.

R. v. Bailey, 2 Str. 1211. ℬ When the indictment is clearly insufficient, the court will quash it on motion, but when it is doubtful, they will put the party to a motion in arrest. Whether to quash it or not in such case, is matter of discretion with the court. The People v. Breese, 7 Cowen, 429.𝒻

Neither would they quash an indictment against overseers for not paying money over to their successors: for quashing is not *ex debito justitiæ*, and this is a growing evil.

R. v. King, 2 Str. 1268.

The court will quash an indictment for not receiving an apprentice, if it does not appear by the circumstances averred, that it was a binding within the stat. 43 Eliz. c. 2, and *Qu.* Whether an indictment lies?

R. v. Trevilian, 2 Str. 1268.

ℬ An indictment was quashed for irregularity, when the grand jury received testimony from a person not under oath, and the finding was founded upon that evidence.

United States v. Coolidge, 2 Gallis. 364; State v. Roberts, 2 Dev. & Bat. 540.

And an indictment for forcible entry, which is found solely on the testimony of the person, who, upon conviction, will be entitled to restitution, will be quashed.

State v. Fellows, 2 Hayw. 240.𝒻

The court will not on motion, quash an indictment against several for breaking and entering a mine, and carrying away lead; especially, if it is at the time that the judges are trying others in the same county for a like offence.

R. v. Johnson, 1 Wils. 325

(K) Where it may be quashed.

Indictment for setting a person on a footway to deliver printed bills of defendant's occupation, whereby the way was obstructed, was quashed.

1 Burr. 516.

So, against a spiritual person, for occupying lands contrary to 21 H. 8, c. 13, for the proceeding must be by action or information, and it must be in one of the king's courts, not at sessions.

R. v. Wright, 1 Burr. 543.

A motion may be made the last day of term, to quash an indictment, but not to quash an order.

1 Burr. 651.

Motion for the prosecutor to quash his own indictment is not of course, especially, if the defendant has been put to expense.

R. v. Webb, 3 Burr. 1468.

If after indictment removed by *certiorari* it is at issue, and jury appointed, prosecutor countermands notice of trial, and defendant chooses to bring it on by proviso, and it stands for trial, and prosecutor in the interim gets a new indictment found, and then moves to quash the first, alleging it to be defective, which was cured by the new, on which it is intended to proceed; the court may (by consent) (*a*) order the first to be quashed, and the second to be put in its place, and to stand in the same condition.

R. v. Webb, 3 Burr. 1468. ‖ Indictment for felony in not surrendering to commissioners of bankrupt, against the statute: the defendant was arraigned, and pleaded; and after plea prosecutor moved to quash the indictment for some mistakes. *Per Cur.* After plea pleaded we never quash an indictment. Upon which prosecutor proceeded on the merits, and defendant was acquitted. O. B. R. v. Edward Frith, October, 1738, *per* Willes, C. J. (*a*) In Sir William Withypole's case, Cro. Car. 147, this was done without the consent of the counsel for the crown; but in the case of Swan and Jefferys, such consent was taken, though held to be unnecessary by Foster, J., Fost. S. C. 106. An indictment at Hereford, in 1756, for murder, alleged that county to be next English county to Carmarthenshire: the fact was committed in *the county of the borough of* Carmarthen: the indictment was quashed by Clive, J., with the consent of the counsel for the prosecution, on the authority of the case of Swan and Jefferys. There being a right indictment found, the four prisoners were tried on it; two were found guilty of manslaughter, and two acquitted. Clive's MSS.‖ ℔ A second indictment is not, *per se*, a supersedeas to the first. A motion to quash the first must be made, and that before the trial on the first indictment has been concluded, for after trial, it is too late to move to quash. The People v. Monroe, Oyer and Terminer, 20 Wend. 108.℈

℔ Quashing an indictment as to one of several defendants, quashed it as to all.

The People v. Eckford, 7 Cowen, 535.℈

The court refused to quash an indictment, for selling flour by false weights, though it appeared on the face of it that the *flour-scale* was the lighter, which must tend to the prejudice of the seller, and though it did not say *where* the selling was.

3 Burr. 1841.*

By the 7 & 8 W. c. 3, § 9, No indictment for high treason or misprision thereof, (excepting indictments for counterfeiting the king's coin, his great seal, or privy seal, his sign manual, or privy signet,) nor any process, or return thereupon, shall be quashed, on the motion of the prisoner or his counsel, for misreciting, misspelling, false or improper Latin, unless exception concerning the same be taken and made in the respective court where such trial shall be, by the prisoner, or his counsel assigned,(*b*) before any evidence given in open court upon such indictment, nor shall any such

misreciting, miswriting, misspelling, false or improper Latin, after conviction on such indictment, be any cause to stay or arrest judgment; but nevertheless any judgment upon such indictment shall and may be liable to be reversed on a writ of error, in the same manner, and no other, than as if this act had not been made.

(*b*) In the construction hereof it hath been settled, that no such exception can be taken after plea pleaded. 2 Hawk. P. C. c. 25, § 148.

|| The court will not quash a defective indictment, on the motion of the prosecutor after plea pleaded, before another good indictment be found.

Rex v. Wynn, 2 East, R. 226

An indictment against a defendant was moved to be quashed on the usual terms; but the court only allowed it to be quashed on disclosing the name of the prosecutor; and that the substituted indictment should stand in the same situation as the first would have done.

Rex v. Glenn, 3 Barn. & A. 373. See Archbold's C. L. 60 (4th edit.)||

INFANCY AND AGE.

(A) Who are Infants: And herein of the several Ages and Periods between which the Law distinguishes as to several Purposes.

(B) To whom the Privilege of Infancy extends, or who are to be considered as Minors.

(C) How far the Law regards and takes Notice of Infants in *Ventre sa Mere*.

(D) How Infancy is to be tried.

(E) Of what Things an Infant is capable, in relation to the Public, and in which he shall answer for his Neglect.

(F) Of what Things capable, being for his own Advantage.

(G) How far the Law takes Care of his Interest, so as not to let him suffer by his Laches: And herein where he must take Notice of and perform Conditions, &c.

(H) Where punishable for Crimes and Injuries committed by him.

(I) Of the Acts of Infants, as they are good, void, or voidable: And herein,

1. *Of his Contracts for Necessaries.*
2. *Of judicial Acts, or Acts done by him in a Court of Record.*
3. *Of his Acts* in Pais, *where void or only voidable.*
4. *Where void, or voidable, as to the Infant, shall yet bind others.*
5. *At what time voidable Acts are to be avoided.*
6. *By whom to be avoided.*
7. *In what Manner they are to be avoided.*
8. *Of the Confirmation of voidable Acts.*

(K) Of the Privilege of Infants in Suits and Actions by and against them: And Herein,

1. *How far the Courts take Care of the Interest of Infants.*
2. *How they are to appear when they sue or are sued.*

(L) Of the Privilege of Infancy as to the Parol's demurring: And herein,

1. *In what Actions the Parol shall demur.*
2. *Where the Parol shall demur without any Plea pleaded.*

(A) Who are Infants.

3. *Upon what Plea pleaded the Parol shall demur.*
4. *For the Nonage of what Person the Parol shall demur.*
5. *In respect to what Estate and Interest the Parol shall demur.*
6. *Where for the Nonage of the Vouchee.*
7. *Where for the Nonage of the* Prayee in Aid.
8. *In what Cases if the Parol demur against one it shall against another.*
9. *In what Cases the demurrer of the Parol for Part shall be for all.*
10. *Of the Prayer of Age and Counterplea.*

β (M) Miscellaneous points.γ

(A) Who are Infants: And herein of the several Ages and Periods between which the Law distinguishes as to several Purposes.

From the observations made on the daily actions of infants, as to their arriving at discretion, the laws and customs of (*a*) every country have fixed upon particular periods on which they are presumed capable of acting with reason and discretion. Hence in our law the (*b*) full age of man or woman is (*c*) twenty-one years.

(*a*) For though the civil law obtains much, being a wise and well calculated law, yet it is not of any force here, or in any other countries, farther than by custom or acts of parliament it has been admitted. Hal. Hist. P. C. 16. (*b*) It is the full age of male or female, according to common speech, Lit. § 104, 259. (*c*) At which age he is capable of contracting, and may alien his lands, goods, and chattels; and this period we have fixed upon from the feudal law, for by that law the tenant at this age was presumed capable to attend his lord in the wars, and therefore at this age was out of ward of guardian in chivalry. Co. Lit. 78 b.—But according to the civil law, the complete full age, as to matters of contract, is twenty-five years. Dig. lib. 4, tit. 4; Hal. Hist. P. C. 17.

Therefore if one under the age of (*d*) twenty-one years makes his (*e*) will, and thereby devises his lands, and after attains the age of twenty-one years, and dies, without making any new publication thereof, this devise is void.

Dyer, 143; Raym. 84; Sid. 162. (*d*) If a child be born the 16th day of February, this child will be of full age any part of the 15th day of February twenty-one years after, for the law makes no fractions of a day, and upon the last instant of that day he would have completed twenty-one years. Keb. 589; Sid. 162; Raym. 84, S. C, Herbert and Tarbol, 2 Mod. 281, S. P. *arguendo;* Salk. 44, S. P., said by Holt to have been adjudged. Ld. Raym. 281, 480. (*e*) So, if an infant make a deed, and deliver it within age, and afterwards upon his coming of full age, deliver it again, yet the deed is void; for the deed must take effect from the first delivery, or not at all. 3 Co. 55 b.

But though a person under the age of twenty-one cannot dispose of his lands, yet it is said that one under that age may, pursuant to the statute of 12 Car. 2, c. 24, dispose of the custody of his infant child, and that such disposition draws after it the land, &c., as incident to the custody.

Vaugh. 178.

Also, it seems, it was agreed, that an infant male at fourteen, and female at twelve, may dispose of their personal estate at those ages: for herein the common law has appointed no time, being a matter cognisable in the spiritual court, which herein proceeds according to the civil law, by which law infants at those ages are presumed to have sufficient discretion to make such disposition; and therefore their testaments in these cases are not set aside or controlled in chancery or the temporal courts.

2 Mod. 315; 2 Jones, 210; Comb. 50; Vern. 255; 2 Vern. 469; Pr. Ch. 316.—In the Office of Execut. 305, it is said, that the common law has not precisely determined at what age a person may make a disposition of his personal estate; but that it is generally allowed it may be made at the age of eighteen.——And my Lord Coke mentions seventeen or eighteen; at which years, he says, an infant may make his testament, and

constitute his executors for his goods and chattels. Co. Lit. 89 b. [The opinions upon this point in the books are numerous and irreconcilable, but the doctrine in the text seems to be the most to be relied upon. See note 6, 13 Ed. Co. Lit. 89 b.

The age of consent to a marriage in an infant male is (*a*) fourteen, and in a female twelve; (*b*) but they may marry before, and if they agree thereto when they attain these ages, the marriage is good; but they (*c*) cannot disagree before then; and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound, or neither.

Co. Lit. 33, 78, 79; 2 Inst. 434; 3 Inst. 88, 89; 6 Co. 22; 7 Co. 43; Roll. Abr. 340, 341. (*a*) That herein our law and the civil agree, for that before these ages they are said to be *impuberes*. Hal. Hist. P. C. 17.—And though by our law they may agree before, yet if the wife hath a child, begotten after marriage, solemnized *infra annos nubiles*, and for that cause afterwards divorced, it is a bastard. 7 Co. 42, &c. Keene's case; Godolph. Repert. Canon. 484. (*b*) And they are baron and feme *de facto;* so that the baron before he attains the age of fourteen, or the wife twelve, may have trespass *de muliere abducta, cum bonis viri*. Roll. Abr. 340; Moore, 741; 2 And. 208; 6 Co. 22. β A marriage with a girl under twelve years of age is invalid, and a court of equity will enjoin the husband from all intercourse. Ayman v. Roff, 3 Johns. Ch. R. 49.*g* (*c*) If they agree by parol, and afterwards agree and live together as man and wife, the disagreement is not binding, but that they may well live together without any new marriage. Roll. Abr. 341, Lee and Ashton.—But, if the disagreement had been before the ordinary, they could never agree again to make it a good marriage. Roll. Abr. 341, *per* Warberton. If a man within the age of fourteen takes a wife of full age, and after brings a writ *de muliere abducta, cum bonis viri*, and after comes to the age of fourteen, if he after makes any continuation of the action, this shall be an agreement to the marriage, so that it cannot after be defeated. 2 Roll. Abr. 341.—[But now the agreement after *twelve* or *fourteen* would not be binding on the infant, if the marriage was without *banns*, or by *license without consent of parent or guardian*, and the infant was not a widow or widower; for the 26 Geo. 2, c. 33, makes all such marriages void.]

But though the party above age may as well disagree as the other, yet it is said that he cannot do it before the other arrives at the proper age: Also, it is said to have been (*d*) adjudged, that if a man marries a woman that is within the age of twelve years, and after the woman at eleven years of age disagrees to the marriage, and after the husband takes another wife, and hath issue by her, that this is a bastard; for the first marriage continues, notwithstanding the disagreement of the woman; for she cannot disagree within the age of twelve years, and so her disagreement is void.

Co. Lit. 79. (*d*) Roll. Abr. 341.

If a man marries a woman that is within the age of twelve years, and after the feme covert within the age of consent disagrees to the marriage, and after the age of twelve years marries another, now the first marriage is absolutely dissolved, so that he may take another wife; for though the disagreement within the age of consent was not sufficient, yet her taking another husband after the age of consent affirms the disagreement, and so the marriage is void *ab initio*.

Roll. Abr. 341. Babington and Warner, adjudged in B. R. upon a writ of error out of the C. B., and the first judgment affirmed. Moore, 575, S. C. adjudged, because she cohabited with her second husband at all times after the age of consent. But *note:* it does not appear in the book whether the second marriage was at or before the age of consent. N. Dyer. 13 a, margin, S. C. cited.

But for the better explication hereof, it may not be improper to insert a case determined before the delegates, which was thus:

Mrs. K. Fitzgerrard was married to my Lord Decius, she being of the age of twelve years and a half, and he of the age of eight; afterwards, she being

thirteen years old disagreed from his marriage, and married Mr. Villers; and upon suit in the spiritual court the second marriage was affirmed. The Lord Decius appealed to the delegates; and it was argued by civilians and common lawyers before the Bishops of London and Rochester, North, C. J., Littleton, Baron, Jones and Atkins, Justices, and several doctors of the civil law. The civilians said, that minors could not contract matrimony, but only *sponsalia de futuro*, and therefore though they bind themselves *per verba de præsenti tempore*, yet the law, by reason of the incapacity of the parties, would make such a construction that it shall only be a contract *de futuro*. In this case indeed one of the parties is of age of consent, but that makes no diversity; for a contract of matrimony is *utrinque obligatorius*, and reciprocal in its nature. On the other side it was said, that such a contract as this betwixt persons of unequal ages might as well claudicate as other contracts, which are also *utrinque obligatorii;* they said, that a contract of marriage carries a relation in itself, and is reciprocal; but that in some cases this may fail, by reason of an accident or circumstance in the persons, notwithstanding which the nature of the thing will remain to be *ultro citroque* obligatory, as we see in other contracts. But arguments from the definition of civil affairs are not cogent; for no law can be framed to meet with all emergencies and circumstances, but ought to be differently applied according as the particular circumstances require. The law does not make contracts *per verba de præsenti tempore* to the contracts *de futuro*, but in cases of minors, and they cannot show any texts that contracts *per verba de præsenti* by *majors* shall be by construction made contracts *de futuro*. The laws of God and Nature require performance of promises and agreements; and the woman, in the present case, cannot dissent *before the husband come to the age of consent*, because till then he cannot dissent any more than he can assent. Serjeant Maynard. In our law, marriage betwixt minors has the effect of a marriage till it be annulled: if the woman be nine years old she shall be endowed, be the husband of what age soever; and dower can never be, but where there was a precedent marriage, *posito effectu poniter causa*. Such a wife shall have an appeal of the death of her husband, and the husband in such a case shall have a writ *de uxore abductâ cum bonis viri*. If tenant by knight's service die, his heir within age of consent, and married, the lord cannot tender him a marriage, [for he cannot disagree to his present marriage, whilst he is within age.] Lee and Ashton, 5 Ja. 1, where two within age had contracted matrimony, and the parent of one was bound to give so much at their age of consent, if they would agree to this marriage: an action was brought for this money, and it was found that within age they disagreed, but at their full age agreed; and judgment was for the plaintiff, because the disagreement was not material. 1 Inst. 79, Banisters v. Offley. Our law calls it *matrimonium*, although the term of *sponsalia* is not unknown to us: we find it in Glanvil, lib. 6, and Littleton calls it an affiance. To show what regard our law has to such a marriage, he cited 1 Inst. 33; 1 Roll. Abr. 340; Dyer, 369. To prove, that before age of consent no agreement or disagreement can be, Moore, 575, 1 Roll. Abr. 341, 1 Inst. 79, and the pleadings in 7 Co. Kenn's case, and 6 Co. Ambrosia Gorge's case. Thursby, *contr*. Our law gives such credit to this inchoate marriage, that if the parties die before it be avoided, the law will not say that it was null and void; and upon this ground are the cases of dower and appeal which have been cited. The case in Dyer, 369, is for the decree; for there, by the opinion of many doctors, *quamvis alia sunt spon-*

salia de futuro, tamen in causa dotis extenduntur ad verum matrimonium ratione privilegii. See too 7 H. 6, 11, 6 Co. 22. The sentence given in the spiritual court was affirmed.

21st June, 29 Car. 2, before the delegates at Serjeants' Inn, Fleet-street.

And as the age of fourteen is the age of consent to a marriage in an infant male; so by law hath he several other ages assigned him to several purposes, viz. at the age of twelve, to take the oath of allegiance in the tourn or leet; at fourteen, to be out of ward of guardian in socage, to choose a guardian; and this also is accounted the age of discretion; at fifteen, to have had *aid pur fair fitz chevalier.*

Co. Lit. 78 b; Hob. 225.

The authority of a guardian in chivalry did not determine till the heir, if a male, came to the age of twenty-one years; because it was presumed that till that age he was not capable of doing knight-service, and attending the lord in his wars. The guardianship of an heir female determined at (*a*) fourteen at common law, but by Westminster the 1st, the lord had the wardship till she attained the age of sixteen, to tender her convenable marriage. But the authority of a guardian in (*b*) socage, as hath been said, ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may (*c*) choose a new guardian.

Lit. § 103; Co. Lit. 75; 2 Inst. 135. (*a*) Before which time, if the guardian disparaged her in marriage, an action lay against him by the statute of Merton, c. 6; Lit. § 108; Co. Lit. 80. (*b*) But the guardianship of the father, which is a guardianship by nature, continues till the son and heir apparent attain to the age of twenty-one years; but that is with respect to the custody of the body only. Carth. 386, *per* Holt, C. J. (*c*) in the spiritual court, if the infant be above the age of seven he chooses his own curator or tutor; but if under that age, they choose one for him.

One within the age of twenty-one years may do homage, but cannot do fealty; because in the doing of fealty he ought to be sworn, which an infant (*d*) cannot be.

Co. Lit. 65 b; 2 Inst. 11. (*d*) But an infant at the age of fourteen may be sworn as a witness, at which age he is presumed to have sufficient discretion. 2 Hal. Hist. P. C. 278. Vide tit. *Evidence*, letter (A).

An infant at the age of seventeen may be a procurator or (*e*) executor; and in this both the civil and common law agree.

5 Co. 29 b; Off. Exec. 307; Hal. Hist. P. C. 17. (*e*) And if one under the age of seventeen be made executor, and administration *durante minore ætate* be granted to another, such administration ceases when the infant arrives at the age of seventeen. Hob. 250; Yelv. 128; 5 Co. 29; Godolph. 102. [But before he attains such age, he cannot assent to a legacy; Prince's case, 5 Co. 29 b; and even then, his assent will not bind him, unless he have assets for debts. Chamberlain v. Chamberlain, 1 Ch. Cas. 257. And though he may administer at seventeen, it is said, that he cannot commit a *devastavit* till twenty-one. Whitmore v. Weld, 1 Vern. 326.]——But, if administration be granted to one during the minority of a person who is entitled to it as next of kin to the intestate, such administration does not determine till the infant's age of twenty-one; because before that age he cannot give bond to the ordinary to administer faithfully. Carth. 446. ‖ And now, by 38 G. 3, c. 87, § 6 & 7, where an infant is sole executor, administration with the annexed will is to be granted to the guardian, or such other person as the spiritual court shall think fit, till the infant shall be twenty-one; such administrator to have the same powers as an administrator *durante minori ætate* of the next of kin. Vide *supra*, tit. *Executors*, (B). vol. iv. p. 17.‖

Infancy is a good cause of refusal of a clerk. Also by the statute 13 Eliz. c. 12, and 13 & 14 Car. 2, no one is to be admitted a deacon unless he be twenty-three years at least, nor a priest unless he be twenty-four.

Comp. Incumb. 142, 214; Gibs. Cod. 168; 3 Mod. 67. ‖ By Can. 34, no bishop shall admit any person into sacred orders, except he, desiring to be a deacon, is three-

and-twenty years old; and to be a priest, is four-and-twenty years complete. And by the preface to the last form of ordination, none shall be admitted a deacon, except he be twenty-three years of age, unless he have a faculty; and every man which is to be admitted a priest, shall be full four-and-twenty years old. By st. 13 Eliz. c. 12, none shall be made *minister*, being under the age of four-and-twenty years. And by st. 44 G. 3, c. 43, reciting that "by the canons of the churches heretofore of England and Ireland, now the united church of England and Ireland, it is ordained, ordered, and directed, that no bishop shall admit any person into the sacred order of a deacon, who is not twenty-three years old; nor to be a priest, except he be twenty-four years complete; and that by the prefaces to the forms of ordination of priests and deacons established and used by authority of several acts of the parliament of England and Ireland respectively, it is directed, that none shall be admitted deacon, except he be twenty-three years of age, unless he have a faculty; and that every man which is to be admitted a priest shall be full twenty-four years old; and that in that part of the United Kingdom called Ireland, the aforesaid rule respecting the ages of persons desiring to be admitted into holy orders, has been sometimes disregarded and rendered of no effect, to the great detriment of the church, and to the prejudice of religion: for the better prevention thereof for the future, and also in order that one certain and undoubted rule and course of practice may hereafter prevail and be observed in this respect in England and Ireland, it is enacted, that no person shall be admitted a deacon before he shall have attained the age of three-and-twenty years complete; and that no person shall be admitted a priest before he shall have attained the age of four-and-twenty years complete;" with a saving, however, "of any right of granting faculties heretofore lawfully exercised, or which now be lawfully exercised by the Archbishop of Canterbury, or the Archbishop of Armagh."

Though the irregularity might have gone to a greater extent in Ireland, yet it was not unusual in England, before this statute, to admit persons into deacon's orders *currente anno*. This practice might seem to be countenanced by the completion of the year not being insisted upon in this case, either in the canon or in the preface to the form of ordination, as it is on the admission to priest's orders.‖

By the custom of *gavelkind*, an infant at the age of fifteen is reckoned at full age to sell his lands; and this seems to have been taken from the civil law, which reckons fourteen the *ætas pubertatis;* for they reckoned that though the infant had ended his years of guardianship at fourteen, yet he might not have completed his account with his guardian till the age of fifteen, and that was esteemed to be the age when he was completely out of guardianship; and therefore at this age he was allowed to sell the lands descended to him: but in this the customs of England differed from the civil law; for the civil law does not allow of his dispositions till the age of twenty-five; and therefore this must have been allowed by the old Saxon law, because they thought that a great deal of time was lost, if the infant could only use his own, without being able to dispose of it in a way of traffic, or in marriage, till twenty-five; and therefore they allowed the infant to sell, but under great limitations and restrictions, that he might not be defrauded; and by this means they thought there was sufficient provision made for the necessity of commerce, which in the small divided shares was absolutely necessary.

Lamb. 624, 625, and vide tit. *Gavelkind.*

Also, by custom, in some places, an infant seised of lands in socage may at the age of fifteen years make a lease for years, which shall bind him after he comes of age; for the custom makes fifteen his full age to that purpose.

Co. Lit. 45 b.

Also, by the custom of London, an infant unmarried, and above the age of fourteen, though under twenty-one, may bind himself apprentice to (*a*) a freeman of London by indenture, with proper covenants; which cove-

nants, by the custom of London, shall be as (*b*) binding as if he were of full age.

Moore, 135; 2 Bulst. 192; 2 Roll. Rep. 305; Palm. 361; 1 Mod. 271. (*a*) But this custom does not extend to one bound apprentice to a waterman under twenty-one; for the company of watermen are but a voluntary society, and being free of that does not make one free of the city of London. 6 Mod. 69. (*b*) And for breach an action may be brought in any other court, as well as in the courts in the city. Moore, 136.

As to capital offences, in which the law is the same with regard to the male and female sex, the age of fourteen is the common standard, at which both males and females are, by (*c*) our law, obnoxious to capital punishments; for this being the *ætas pubertatis*, or age of discretion, the law presumes them at those years to be *doli capaces*, and capable of discerning between good and evil; and therefore subjects them to capital punishments as much as if they were of full age.

F. N. B. 202; Co. Lit. 247 b; Dalt. ap. 95, and 104; Hal. Hist. P. C. 25; Hawk. P. C. 2; Fost. Cr. Law, 70. (*c*) But the civil law, as to capital punishments, distinguished the ages into four ranks: 1. *Ætas pubertatis plena*, which is eighteen years. 2. *Ætas pubertatis* or *pubertas* generally, which is fourteen years, at which time they were likewise presumed to be *doli capaces*. 3. *Ætas pubertati proxima;* but in this the Roman lawyers were divided, some assigning it to ten years and a half, others to eleven, before which the party was not presumed to be *doli capax*. 4. *Infantia*, which lasts till seven years, within which age there can be no guilt of a capital offence. Hal. Hist. P. C. 17, 18, 19.

But though the age of fourteen be the *ætas pubertatis*, before which our law does not presume the party to be *doli capax*, and therefore that a party indicted for a capital offence committed before these years, is to be found not guilty; yet hath this general rule the following temperaments:

Hal. Hist. P. C. 26; β State v. Mary Doherty, 2 Tenn. R. 88.*g*

1. That if the party be above twelve, though under fourteen, and appears to be *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained the age of fourteen; though herein, according to the nature of the offence and circumstances of the case, the judge may or may not in discretion reprieve him before or after judgment in order to the obtaining the king's pardon.

Hal. Hist. P. C. 26. [See the case of William York, a boy of ten years of age, convicted before Lord Chief Justice Willes at Bury summer assizes, 1748, for the murder of a girl of about five years of age. Fost. Cr. Law, 70.]

‖ In 12 Assis. pl. 30, Alice de Walborough, of the age of thirteen years, was burnt by judgment for killing her mistress. And it was then said, that by the ancient law none shall be hanged within age, which is intended the age of discretion, viz., fourteen years. But before Spigurnel, an infant within age, viz., of the age of ten years, who had killed his companion and hidden himself (*se mucha*) was presently hanged; for it appeared by his *muching*, he could discern between good and evil, *et malitia supplet ætatem*

Fitz. *Corone*, 118, 170; Br. *Treason*, 12. We are told in N. Bacon upon Government, p. 55, that Alfred punished a judge capitally for having passed sentence of death upon a person under the age of twenty-one years.‖

2. If an infant be above seven, and under twelve years, and commit a capital offence, *primâ facie* he is to be judged not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil. But yet if it appear, by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment

of death may be given against him; for *malitia supplet ætatem;* but herein the circumstances must be inquired of by the jury, and the infant is not to be convict (*a*) upon his confession. Also herein, my Lord Hale says, that it is prudence after conviction to respite judgment, or at least execution; but he says, that if he be convicted, the judge cannot discharge him, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known.

Hal. Hist. P. C. 27. (*a*) || In York's case, *supra,* the declarations of the boy were admitted in evidence.

3. If an infant within age be *infra ætatem infantiæ*, viz., seven years old, he cannot be guilty of felony, whatever circumstances proving discretion may appear; for *ex presumptione juris* he cannot have discretion, and no averment shall be received against that presumption.

Hal. Hist. P. C. 27, 28; Plow. 19 a.

β The laws of the domicil of origin govern the state and condition of the minor, into whatever country he may remove; therefore, a person born in Louisiana will be of age at twenty-one years, although she may remove to Spain, where minority does not cease till twenty-five.

Barrera v. Alpuente, 6 N. S. 70.*g*

(B) To whom the Privilege of Infancy extends, or who are to be considered as Minors.

THE privilege of infancy does not extend to the king; for the political rules of government have thought it necessary, that he who is to govern and manage the whole kingdom, should never be considered as a minor, incapable of governing himself and his own affairs.

Co. Lit. 43; Dyer, 209 b.

Therefore, if the king within age make any lease or grant, he is bound presently, and cannot avoid them, either during his minority, or when he comes of full age.

Plowd. 213 a; 5 Co. 27; 7 Co. 12.

So, if the king consent to an act of parliament during his minority, yet he cannot after avoid this act; because the king, as king, cannot be a minor; for as king he is a body politic.

Co. Lit. 43; Roll. Abr. 728.

Also, the acts of a mayor and commonalty shall not be avoided by reason of the nonage of the mayor.

Cro. Car. 557; 5 Co. 27.

Although a duke, earl, or the like, be but a minor, or not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains, yet he may qualify chaplains to be dispensed withal to hold two benefices with cure, in like sort as if he was of full age.

4 Co. 119; Comp. Incumb. 29.

An infant in gavelkind shall have his age, and all other privileges of the infant at common law; because though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at common law.

Roll. Abr. 144.

A bastard being impleaded shall have his age; for the dilatory plea must be determined before the plea in chief can come on; so that

(C) How far the Law regards Infants in *Ventre sa Mere.*

the plea of infancy will stay the suit, before it can be inquired whether he is or is not a bastard.

Co. Lit. 244 b.

β As between a father and son, the former may relinquish a part of his minority.

Tillotson v. M'Crillis, 11 Verm. 477; Varney v. Young, 11 Verm. 258; Corey v. Corey, 19 Pick. 29.*g*

(C) How far the Law regards and takes notice of Infants in *Ventre sa Mere.*

A CHILD in *ventre sa mere* may be appointed executor, or may take a legacy: also, if there are two or more at a birth, they shall be joint executors or joint legatees of the thing bequeathed; for the (*a*) civil law, for the benefit of the infant, reputes a child in his mother's womb in the same condition as if he were born.

Godolph. Orph. Leg. 102. (*a*) And by our law a child in *ventre sa mere* may be vouched; is capable of taking; the mother may detain charters on his behalf; a bill may be brought on his behalf; a court of equity will grant an injunction in his favour to stay waste; 2 Vern. 710, [and the destruction of him is murder. 3 Inst. 50; 1 Ves. 86.] β See Hall, Judge, &c. v. Hancock, 15 Pick. 255.*g*

If there be a *bastard eigne* and *mulier puisne*, and the bastard enter, and die seised, his issue shall inherit the lands, and exclude the *mulier* for ever. But in this case, if the bastard had died leaving issue in *ventre sa mere*, and the *mulier* had entered, and then a son were born, yet could not he enter upon the *mulier*. And herein our law differs from the civil law; for our law requires an immediate descent, which cannot be before the person is in *esse*. Also, by our law, the freehold cannot be in abeyance.

Co. Lit. 244.

It appears to have been a matter of much controversy, whether a devise of lands to an infant in *ventre sa mere* be good, because not in being to take at the time of the death of the devisor. For, as some say, by the devise the person is to take immediately after the death of the devisor, and the freehold cannot be put in abeyance by the act of the parties. But others hold, that such devise is good, though the infant be not in *esse* at the death of the devisor, and that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time.

11 H. 6, 13; Bro. Devise, 32; Moore, 177, 637; 2 Buls. 273; Cro. Eliz. 423; 1 Lev. 135; 1 Sid. 153; Raym. 163; 1 Keb. 85; 1 Salk. 231; 2 Mod. 9; 2 Vern. 711; Prec. Chan. 50; Eq. Cas. 173; 2 Stra. 1092; 2 Eq. Abr. 294, pl. 24; Andr. 263, S. C. S. P. β A child in *ventre sa mere* is capable of taking by devise. Pratt's Lessee v. Flamer, 5 Har. & Johns. 10.*g*

But, however, all the books agree in this, that a devise to an infant when he shall be born, or when God shall give him birth, is good as an executory devise, and that the freehold shall descend to the heir at law in the mean time.*

Sid. 153; Lev. 135; Raym. 163, S. C. Snow and Cutler. * At this day it is clearly agreed that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. 1 Freem. 244, 293; Vide Fearne's Essay, 3d edition, 429, &c.

So it is clear, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instanti* that it determines, it is sufficient.

Church v. Wiatt, Moore, 637; Reeve v. Long, 3 Lev. 408; 4 Mod. 359; Salk. 227; Carth. 209; and vide 10 & 11 W. 3, c. 16, and head of *Remainder* and *Reversion.*

(D) How Infancy is to be tried.

Also, it seems agreed, that a man may surrender copyhold lands immediately to the use of an infant in *ventre sa mere;* for a surrender is a thing executory, and nothing vests before admittance; and therefore, if there be a person to take at the time of the admittance, it is sufficient; and not like a grant at common law, which, putting the estate out of the grantor, must be void, if there be nobody to take.

Roll. Rep. 109, 138; 2 Bulst. 273; Co. Copyh. 9, and vide Moor, 637.

If an usurpation be had on one in *ventre sa mere*, at the next turn after his birth he shall be relieved on the statute Westm. 2, c. 5.

Hob. 240.

‖ A child in *ventre sa mere* is within a provision in marriage articles for such children of the marriage as shall be *living* at the time of the decease of the father and mother.

Hale v. Hale, Pr. Ch. 50; Millar v. Thiner, 1 Ves. 85; Beale v. Beale, 1 P. Wms. 244. See *contr.* Pierson v. Garnett, 2 Br. Ch. Rep. 38; Cooper v. Forbes, Ibid. 63. But these cases are over-ruled, and the law perfectly settled in Clarke v. Blake, Ibid. 320, S. C., by the name of Doe v. Clarke, 2 H. Bl. 399; 2 Ves. jun. 673, S. C., referred to in Thellusson v. Woodford, 4 Ves. 340; Northy v. Strange, 1 P. Wms. 342; Gilb. Eq. Rep. 136.

He may take under the statute of distributions, as living at the death of the testator.

Burnett v. Mann, 1 Ves. 156; Wallis v. Hodson, 2 Atk. 114; Barnardist. Ch Rep. 271, S. C. Where money was left to executors in trust, to dispose of it in such proportions, &c., as they should think fit, among such of the testator's relations as should not be worth 2000*l.* and should apply within two years after his death; a child in *ventre sa mere* at the testator's death was holden not to be within the description; Lord Bathurst saying, that the court had never put such a construction upon a will, but in the case of a devise to children. Bennett v. Honywood, Ambl. 708.

He will prevent a remainder depending upon the death of the father without leaving issue from taking effect.

Burdett v. Hopegood, 1 P. Wms. 487.

A limitation to such a child for life, with remainder over in strict settlement, will be good.

Long v. Blackall, 3 Ves. 486; 7 T. R. 700, S. C., and see also Thellusson v. Woodford, 4 Ves. 342.

Marriage, and the birth of a posthumous child, will operate as a revocation of a will made before marriage.

Doe v. Lancashire, 5 T. R. 49.

It is now clearly settled, that a child in *ventre sa mere* is a life in being to all intents, except in the case of a descent at common law.

Thellusson v. Woodford, 4 Ves. 334.‖

(D) How Infancy is to be tried.

INFANCY is to be tried by inspection of the court, or by jury. And herein it is laid down as a rule in some books, that wheresoever it is alleged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection; but, where the infant is of full age at the time of the plea, there it shall be tried *per pais*.

Lev. 142; Sid. 321; Keb. 796; Cro. Ja. 59, 581.

But here we must observe, that as to judicial acts, or acts done by an infant in a court of record, which he is allowed to avoid, the trial thereof must be by inspection; and therefore if an infant levies a fine, he must

reverse it by writ of error; and this must be brought during his minority, that the court may by inspection determine the age of the infant; but the judges, as by *adjuncta*, may in such cases inform themselves by witnesses, (*a*) church-books, &c.

Co. Lit. 380; Moore, 76; 2 Roll. Abr. 15; 2 Inst. 483; 2 Bulst. 330; 12 Co. 122.
(*a*) To prove the nonage of a devisor, an almanac, in which the father had written the nativity of his son, was allowed to be strong evidence. Raym. 84.

If an infant brings a writ of error to reverse a fine for his nonage, and, after inspection, and proof of infancy by witnesses, dies before the fine is reversed, his heir may reverse it; because the court, having recorded the nonage of the conusor, ought to vacate his contract, when he appeared to be under a manifest disability at the time he entered into it.

Co. Lit. 380; Moore, 884, Keckwick's case.

An infant acknowledges a fine, and the conusees omitting to have the fine engrossed till he came of age, in order to prevent the infant from bringing a writ of error; the court, upon view of the conusance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his nonage, to give him the benefit of his writ of error, which he must otherwise lose, his nonage determining before the next term.

Moore, 189, and vide Cro. Ja. 230, 231, Poynt's case.

So, if an infant suffer a common recovery by appearing in (*b*) person, this must be reversed during his minority by inspection of the judges.

(*b*) If he suffers a common recovery by guardian, and has a privy seal for that purpose, such recovery cannot be at any time set aside. But for this vide tit. *Fines* and *Recoveries*, and *infra* letter (I).

But it is said, that if an infant suffers a recovery, in which he appears by attorney, he may reverse it after his full age, as it may be discovered whether he was within age when the recovery was suffered; because it may be tried *per pais* whether the warrant of attorney was made by him when he was an infant.

Sid. 321; Lev. 142.

It is said, that in all cases where the party pleads that he was within age at B, and alleges a place, that there the trial may be well enough where it is alleged; where no place is alleged, there in personal actions where the writ is brought; and in (*c*) real actions where the right of the lands depends upon infancy, the trial is to be where the land lies; and if not, where the action is brought.

Skin. 10. (*c*) Cro. Eliz. 818, S. P.

An infant entered into a recognisance of 100*l.* as bail to J S, which became forfeited, and he was taken in execution; whereupon he brought an *audita querela*, suggesting his infancy, and the writ being brought into court, he appeared *in propriâ personâ*, and it was moved that he might be inspected, and his witnesses examined; and thereupon his mother peremptorily deposed, that at that very time he was twenty years old, and no more, and a maid servant gave circumstantial evidence to the same purpose; and it was moved that he might be bailed: but *per curiam*, it is a matter of discretion either to admit him to bail, or to refuse it, he being in execution; but if he had brought his *audita querela* before he had been taken in execution, he must have a *supersedeas* of course; and the court would not bail him, though a long vacation was near, but required the evidence to be strengthened by a copy of the register where he was

born, which being in Yorkshire, he appeared again in Mich. term in custody, and a copy of the register was produced, and sworn to be a true copy, and the mother and the maid being again sworn, and all agreeing in the same thing, he was discharged by the court.

Carth. 278; Trin. 5 W. 3, Loyd v. Eagle.

(E) Of what Things an Infant is capable in relation to the Public, and in which he shall answer for his Neglect.

An infant seems capable of such offices as do not concern the administration of justice, but only require skill and diligence; and these, it seems, he may either exercise himself, when of the age of discretion, or they may be exercised by deputy; such as the offices of park-keeper, forester, (*a*) jailer, &c.

Plowd. 379, 381; 9 Co. 48, 97. Vide tit. *Offices*. (*a*) The statute of Westminster 2, c. 11, extends to an infant jailer, so as to charge him in an action of debt for an escape of one in execution. 2 Inst. 382; 3 Mod. 222, S. P. cited.

But it is said, that an infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; because, by intendment of law, he hath not sufficient knowledge, experience, and judgment to use the office, and also because he cannot make a deputy.

Co. Lit. 3 b; Roll. Abr. 731; 2 Roll. Abr. 153; March, 41, 43; Cro. Eliz. 636; Cro. Car. 556.

An infant cannot be an (*b*) attorney, (*c*) bailiff, factor, or receiver.

F. N. B. 118; Roll. Abr. 117; Co. Lit. 172; Cro. Eliz. 637. (*b*) Cannot be an attorney, because he cannot be sworn. March, 92. (*c*) Because not to be charged in any account. Co. Lit 172.——Not in an *indebitatus* upon an *insimul computasset;* for in this action no evidence shall be given of the value or necessity of the things, but of the account only, in which the infant may be mistaken. Latch. 169, adjudged; Noy, 87, S. C. adjudged, between Wood and Witerick, and vide Palm. 528; 2 Roll. Rep. 271. [Trueman v. Hurst, 1 T. R. 40, adjudged.] In the case of Trueman v. Hurst, the court only held, that the infant should not be bound by the admission he had made during his infancy, that the note on which the action was brought, was for necessaries. In the case of Ingledew v. Douglas, 2 Stark. N. P. C. 36. Lord Ellenborough held, that a statement of an account by an infant could not be received in evidence after he came of age, even to show that he had been supplied with the necessaries mentioned.——Nor can an infant be charged as a bailiff, &c., in equity farther than in law; and therefore it is said, that if such a one is made factor, his friends should give security for his accounting. Abr. Eq. 6.

If an infant, being master of a ship at St. Christopher's beyond sea, by contract with another, undertakes to carry certain goods from St. Christopher's to England, and there to deliver them; but does not afterwards deliver them according to the agreement, but wastes and consumes them, he may be sued for the goods in the Court of Admiralty, though he be an infant; for this suit is but in nature of a detinue, or trover and conversion at the common law.

Roll. Abr. 530, Furnes and Smith, and a prohibition denied to the Court of Admiralty.

If an infant keeps a common inn, an action on the case upon the custom of inns will not lie against him.

Cross v. Androes, Roll. Abr. 2; Carth. 161, S. C. cited; 2 Marsh, 486, S. C. cited.

So, if an infant draws a bill of exchange, yet he shall not be liable on the custom of merchants, but he may plead infancy in the same manner that he may do any other contract of his.

Carth. 160, Williams v. Harrison, adjudged on demurrer. [But *qu.* whether an actior will not lie on a promissory note given by an infant for necessaries?] βA negotiable note given for necessaries is void. Swasey v. Adm'r. of Vanderheyden

(F) Of what Things capable, &c.

10 Johns. 33; M'Minn v. Richmonds, 6 Yerg. 1. But see Goodsell v. Myers, 3 Wend. 479, where it is said to be merely voidable.*g* ||In Williamson v. Watts, 1 Campb. N. P. 552, infancy being pleaded to an action against the acceptor of a bill, the plaintiff replied, it was accepted for necessaries; and Mansfield, C. J., thought the action could not be maintained, and that the replication should have been demurred to, because an infant could not be liable as the acceptor of a bill. In this case of Williams v. Harrison, the security was given in the course of trade. An infant cannot be a trader within the statutes of bankrupts. *Ex parte* Adams, 1 Ves. & Beam. 494; *Ex parte* Sidebotham, 1 Atk. 146; *Ex parte* Moule, 14 Ves. 603.||

An infant cannot be a (*a*) juror; and it is said by Hobart that by the wisdom of the common law a person under forty-two could not be on a trial *de ætate probandâ*, because he then tried a matter which might have happened before he was twenty-one.

Hob. 325. *β*The office of clerk of the peace being merely ministerial may be held by an infant. Crosbie v. Hurley, 1 Alcock & Nap. 431.*g* (*a*) But may be a witness, if he appears to have discretion. Vide tit. *Evidence*.

An infant, or one under the age of twenty-one years, cannot be elected a member of the House (*b*) of Commons; nor can any lord of parliament sit there until he be of the full age of twenty-one years.

2 Inst. 47. (*b*)This is expressly enacted by the 7 & 8 W. & M. c. 25, § 8. See *supra*, vol.ii., p. 661. *β*An infant cannot hold a civil office. The People v. Dean, 3 Wend. 438.*g*

An infant may be appointed executor, but he cannot administer until he is of the age of seventeen; (*c*) and before that age administration is to be granted to some friend of his; but an infant cannot be an administrator before the full age of twenty-one years, because before that age he cannot give bond, as required by the statute, to administer faithfully.

Vide head of *Executors and Administrators*, letter (A). (*c*)||Not till twenty-one, by 38 G. 3, c. 87, § 6.||

|| And as an infant is capable of executing a bond, he cannot be the petitioning creditor for a commission of bankruptcy, for the statute requires the bond to the great seal to be given by the creditor himself.

Ex parte Barrow, 3 Ves. 554.

An infant cannot be appointed to the office of clerk of a court of requests, where it is part of the duty of that officer to receive the money of the suitor, for the same remedies would not exist against him as against a person of full age.

Claridge v. Evelyn, 5 Barn. & A. 81.||

(F) Of what Things capable, being for his own Advantage.

An infant is capable of inheriting, for the law presumes him capable of property. Also, an infant may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; and if at his full age the infant agrees to the purchase, he cannot afterwards avoid it. But, if he dies during his minority, his heirs may avoid it; for they shall not be bound by the contracts of a person who wanted capacity to contract.

Co. Lit. 2, 8; 2 Inst. 203.

If an infant take a lease for years rendering rent, if he enter upon the land he shall be charged with an action of debt during his minority, because the purchase is intended for his (*d*) benefit; but he may waive the

term, and not enter, and if more rent be reserved upon the lease than the land is worth, he may avoid it.

2 Buls. 69. (*d*) The Court of Chancery will decree building leases of 60 years of infants' estates, when it appears to be for their good. 2 Vern. 224.

If an infant be lord of a copyhold manor, he may grant copyholds notwithstanding his nonage; for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor by which they have been demised, and are demisable, time out of mind.

4 Co. 23 b; Co. Copyhold, 79, 107; Noy, 41; 8 Co. 63.

An infant may present to a church; and here it is said, that this must be done by himself, of whatsoever age he be, and (*a*) cannot be done by his guardian, for the guardian can make no advantage thereof, and, consequently, has nothing therein whereof he can give an account, and therefore the infant himself shall present.

Co. Lit. 17 b, 89 a; 29 E. 3, 5; 3 Inst. 156; Willes, 190, vide *supr.* vol. iv. p. 557. (*a*) But it is said, that if the heir be within the age of discretion, the guardian may present in his name. Cro. Ja. 99, and vide Parson's Law, c. 20, fol. 76.——Also a presentment made by the guardian, in the name of the heir, is a good title to the heir in a *quare impedit.* 42 E. 3, 130.

|| An infant may sue on a contract in part executed by him, and which is for his benefit.

Warwick v. Bruce, 2 Maule & S. 205; 6 Taunt. 118.

He may bind himself apprentice by indenture, because it is for his benefit; and though he be a pauper in the parish workhouse at the time of his binding, and the parish officers pay the premium, yet it is not necessary that they should sign the indenture, or that the justices should assent thereto, if the apprentice be not a parish apprentice within the meaning of the statute of 43 Eliz. c. 2.

Rex v. Inhab. of Arundel, 5 Maule & S. 257.

A warranty of a horse sold, given by an infant, is not a contract for his benefit on which he can be sued.

Howlett v. Haswell, 4 Camp. 118.||

(G) How far the Law takes Care of his Interest, so as not to let him suffer by his Laches: And herein, where he must take Notice and perform Conditions, &c.

The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking notice of the rules of law, so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of (*b*) claim and entry within a year and a day, nor are they bound by a fine and five years' non-claim, nor by the statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment removed.

Plowd. 358 a, 360 a; 4 Co. 125 a; vide tit. *Fines and Recoveries,* and tit. *Limitations.* (*b*) Not bound by a *cessavit per biennium,* because the law intends that they do not know what arrearages to tender. 3 Mod. 223.

If lands are devised to trustees till debts paid, and then to an infant and his heirs, and J S, a stranger, enters on the lands, and levies a fine, and five years and non-claim pass, and the infant, when of age, brings an ejectment, but is barred, because the trustees ought to have entered; yet equity will relieve, and not suffer an infant to be barred by the laches

of his trustees, nor to be barred of a trust-estate during his infancy; and the infant in this case shall recover the mesne profits.(*a*)

2 Vern. 368, Allen v. Sayer. (*a*) || But see the case of the Earl v. the Countess of Huntingdon, 3 P. Wms. 310, note (G), where Lord Chancellor Parker was of opinion, but did not then determine the point, that a fine and five years' non-claim should, in favour of a purchaser, bar a trust-term, though the *cestui que trust* was an infant. And in Wych. v. E. I. Company, 3 P. Wms. 309, Lord Talbot held that the statute of limitations will run against an infant *cestui que trust*, upon the neglect of the trustee to sue. So time in redemption of a mortgage may run upon an infant. St. John v. Turner, 2 Vern. 419. So his infancy will not excuse his non-assertion of his right under an executory agreement made with his ancestor, where the immediate performance of his part of the contract is essential to the interests of the other contracting party. Griffin v. Griffin, 1 Sch. and Lefr. 352.||

It has been ruled in Chancery, that where one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, that the statute of limitations is a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of a court of equity, the statute shall be no bar to, for he might have had his action of account against him at law, and therefore no necessity to come into this court for the account; but the reason why such bills are brought here is from the nature of the demand, that they may have the discovery of books, papers, and the party's oath, for the more easy taking of the account, which they cannot so well do at law. But, if the infant lies by for six years after he comes of age, as he is barred of his action of account at law,(*b*) so shall he be of his remedy in this court; and there is no sort of difference in reason between the two cases.

Pr. Ch. 518, Lockey and Lockey. (*b*) If a stranger enters and receives the profits of an infant's estate, he shall, in consideration of equity, be looked upon as a trustee for the infant. 2 Vern. 342; Vern. 295, S. C.—So, if a man, during a person's infancy, receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age before any entry is made on him, yet he shall account for the profit throughout, and not during the infancy only. Abr. Eq. 280, Yallop and Holworthy.

The entry of an infant is not taken away by a descent cast, by reason of his weakness and incapacity to claim, which is not to be imputed to him.

Lit. § 402, 403.

But, if a man seised of lands in fee die, his wife *privement ensient* with a son, and a stranger abate, and die seised, and after the son is born, he shall be bound by the descent; because at the time of the descent he had no right to enter, not being *in esse*, and, by consequence, had no wrong then done him, and the lord had none but the heir to avow upon at the time of the descent.

Co. Lit. 245 b.

B, tenant in tail, enfeoffs A in fee, who hath issue within age, and dies, B abates and dies seised; the issue of A being still within age; this descent shall bind the infant, because the issue in tail is remitted to his former and elder right, which is to be preferred before the defeasible title of the discontinuee's heir.

Co. Lit. 246 a.

It is a rule in law, that the possession and dying seised of a *bastard eigne* bars the *mulier*. So, if the *mulier* be an infant during the possession of the *bastard eigne*, yet he is barred by the descent. For though no laches can be imputed to an infant, because, not being of the age of consent,

his permission cannot be taken for a consent; yet in such cases, where time is limited by the law for pleas and actions, infants are included, unless specially excepted. For here their permission is taken for a consent; because they are supposed to consent to the established law, to which they are obliged for protection during minority; and the law hath not thought fit in this case, because it might happen to be a public mischief in a very tender point, for it might be any man's case to suffer by the bastardy of an ancestor. And the law hath given the infants guardians to plead by, but it cannot revive the evidence of legitimation, which so easily perishes with the life of the party.

Co. Lit. 244; 8 Co. 101; Sir Richard Pexhall's case, Plowd. 372.

If an infant be tenant by the curtesy, or lessee for life or years, he shall answer not only for waste committed by himself, but also for permissive waste or wastes committed by a stranger; for the privilege of infancy cannot prevail in a matter that would be a wrong and disherison to him who hath the inheritance; nor is it in the last case any hardship to the infant, because he hath his remedy over against the wrong-doer.

2 Inst. 303.

If by tenure or prescription certain lands are obliged to the repair of bridges, highways, &c., and such lands come to an infant either by descent or purchase, he shall be obliged to repair, &c., in the same manner as if he were of full age.

2 Inst. 703.

If an infant present not to a church within six months, it shall lapse. If the five years for making a claim after a fine begin in the ancestor's life, he must claim within them. If he does not claim a villain, fled into ancient demesne, within a year and a day, he cannot afterwards claim him; and he shall be barred in an appeal of the death of his ancestor, if he do not bring it within a year and a day. If the king die seised, the infant is driven to his petition; for in these cases the law prefers the good of the church, the public repose of the realm, liberty, life, and the king's prerogative, before the privilege of infancy.

Co. Lit. 246.

An infant is bound by (*a*) all conditions, charges, and penalties, in an original conveyance, whether he comes to the estate by grant or descent.

2 Inst. 233; 8 Co. 44; Latch, 199; 2 Roll. Rep. 72; Leon. 100; Hard. 11. (*a*) Bound by conditions annexed to the estate at common law, because *transit cum onere;* and therefore if the infant will have the estate, he must observe the condition upon which it was granted. Carth. 43.

Therefore, if a person devise to his grand-daughter, who is not heir at law, lands, upon condition that she marry with the consent of certain trustees, she is obliged to take notice, at her peril, of the condition, and likewise to perform it; but had she been heir at law, she must have had notice given her of the condition, to make the marriage, without consent, a forfeiture.

Vent. 200; 2 Lev. 21; 1 Mod. 86, 300; Fry and Porter, adjudged, *supra.*

An infant shall be bound by conditions in fact, and such conditions as he can perform, in equity as well as in law, as was adjudged in the precedent case of Fry and Porter.

2 Vern. 343.

So, where A gave lottery-tickets amongst her servants, on condition,

that if any of them came up a prize of 20*l.* or more, they should give one-half to her daughter; and the ticket given the foot-boy, who was an infant, came up 1000*l.* prize; it was holden in Chancery, that the daughter was well entitled to a moiety, for a gift to an infant, on condition, binds him as well as another person.

2 Vern. 560, Scott v. Haughton.

If an office in a parkship be given or descend to an infant, if the condition in law annexed to such an office (which is skill) be not observed, the office is forfeited.

3 Mod. 224.

If a man make a feoffment in fee to another, reserving rent, and if he pay not the rent within a month, that he shall double the rent, and the feoffee die, his heir within age, and the infant pay not the rent, he shall not by his laches herein forfeit any thing: but otherwise it is of a feme-covert. And the reason of the diversity is, because the infant is provided for by the (*a*) statute, *non current usuræ contra aliquem infra ætatem existen.*, &c., but that statute doth not extend to a feme-covert, neither doth it extend to a condition of a re-entry, which an infant ought to perform, for the forfeiture thereof cannot be called *usura.*

Co. Lit. 246 b. (*a*) Statute of Merton, c. 5.

It has been holden by some (*b*) opinions, where the custom of a copyhold manor was, that every surrender, which is made *secundum consuetudinem* out of court, should be presented by the homage at the next court to be holden for the said manor; and that upon such a presentment proclamation had been usually made, and so for three courts next following; and if upon the third proclamation no person came to be admitted, &c., that then the lord of the manor should seize the lands as forfeited; that this custom bound an infant.

(*b*) By Holt, C. J., v. three judges in the case of King and Dalliston, Carth. 41, &c.; Salk. 386; Comb. 118; 3 Mod. 221; Show. 84; Lutw. 765.

But this is now settled by the 9 G. 1, c. 29, § 5, by which it is enacted, "That no infant, or feme-covert, shall forfeit any copyhold, messuages, &c., for their neglect or refusal to come to any court or courts, to be kept for any manor whereof such messuages, &c., are parcel, and to be admitted thereto; nor for the omission or denial to pay any fine or fines imposed or set upon their, or any of their admittances to any such copyhold, messuages, &c."

If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death. But it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts. But, if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but upon demand, and he shall not have interest but from the time of his demand. Otherwise it is in the case of an infant, because no laches are imputed to him.

2 Salk. 415, *per* Cowper, Lord Chancellor.

‖ To remove the difficulty an executor was under how to act with respect to a legacy bequeathed to an infant; for he ran a risk in paying it to the father, or any other relation, without the sanction of a court of equity; it is enacted by 36 G. 3, c. 52, § 32, that where, by reason of the infancy of any

legatee, the executor cannot pay the legacy, it shall be lawful for him to pay such legacy, after deducting the duty payable thereon, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his certificate, on the production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid; and such payment into the bank shall be a sufficient discharge for such legacy; and when paid it shall be laid out by the accountant-general in the purchase of three *per cent.* consolidated bank annuities; which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the Court of Chancery by petition, or motion, in a summary way. But the executor is not bound to pay the legacy into the bank, till the expiration of a year after the testator's death.

2 Rob. on Wils. 123. See Lee v. Brown, 4 Ves. 362.‖

(H) Where punishable for Crimes and Injuries committed by him.

It has been already observed, that one above the age of fourteen, or of years of discretion, may be guilty of a capital offence in the same manner as one of full age; also, that one under these years, if above the age of seven, may, according to the circumstances of the case, as if in murder he hides the body slain by him, makes excuses, or otherwise shows such signs of cunning as demonstrate him capable of discerning between good and evil, be guilty and convicted of a capital offence; but that in these latter cases, the judges may respite judgment, or execution, in order to the obtaining of the king's pardon.

Hal. Hist. P. C. 16, &c., *supra*, letter (A). Fost. Cr. Law, 70; *β* Commonwealth v. M'Keager, 1 Ashm. 248.*g*

Also, if an infant, under the age of fourteen, be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find him generally not guilty, or they may find the matter specially, that he committed the fact, but that he was under the age of fourteen, *scilicet ætatis* 13 *annorum*, and had not discretion to discern between good and evil, *et non per feloniam;* and thereupon the court gives judgment of acquittal, 21 H. 7, 31. But, if a man be arraigned in such a case upon an indictment of murder, or manslaughter by the coroner's inquest, there, if the party committed the fact, regularly, the matter ought to be specially found; because if the jury find the party not guilty, they must inquire how he came by his death. But, if he be first arraigned, and acquitted upon the indictment by the grand inquest, he may plead that acquittal upon his arraignment upon the coroner's inquest, and that will discharge him; and the *petit jury* shall inquire farther how the party came by his death.

Hal. Hist. P. C. 28, 29.

As to misdemeanors and offences that are not capital, in some cases an infant is privileged by his nonage; and herein the privilege is all one, whether he be above the age of fourteen, or under, if he be under one-and-twenty years, but with these differences:

Hal. Hist. P. C. 20.

If an infant under the age of twenty-one years be indicted of any misdemeanor, as a riot or battery, he shall not be privileged barely by reason that he is under twenty-one years; but, if he be convicted thereof by due trial, he shall be fined and imprisoned. And the reason is, because upon

his trial the court *ex officio* ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged; and the same law is of a feme covert. But, if the offence charged by the indictment be a mere non-feasance, (unless it be of such a thing as he is bound to by reason of tenure, or the like, as to repair a bridge, &c.,) there, in some cases, he shall be privileged by his nonage, if under twenty-one, though above fourteen years, because laches in such a case shall not be imputed to him.

Bro. *Saver Default*, 50; Plowd. 364 a; Co. Lit. 246 b; 2 Inst. 703; Cro. Ja. 465; Hal. Hist. P. C. 20. ßThe infant's property is liable to satisfy the fines and costs adjudged against him upon a conviction for a crime and misdemeanor. Beasley v. The State, 2 Yerg. 481.ℊ

If an infant in assize vouch a record, and fail at the day, he shall not be imprisoned; nor, it seems, a feme covert; and yet the statute of Westm. 2, c. 25, that gives imprisonment in such a case, is general.

Hal. Hist. P. C. 20.

If A kills B, and C and D are present, and do not attach the offender, they shall be fined or imprisoned; yet if C were within the age of twenty-one years he shall not be fined or imprisoned.

Hal. Hist. P. C. 21.

Where the corporal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanor, there, in many cases, the infant, under the age of twenty-one, shall be spared, though possibly the punishment be enacted by parliament.

Hal. Hist. P. C. 21.

It is said by Hale, that if an infant, of the age of eighteen years, be convict of a disseisin with force, yet he shall not be imprisoned, and yet a feme covert shall be imprisoned in such case.

Hal. Hist. P. C. 21.

But herein the law seems to be, that an infant at the age of eighteen, nay fourteen, or a feme covert, by their own acts, may be guilty of a forcible entry, and they may be fined for the same; but it seems by the better opinion, that the infant cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion, being not (*a*) particularly mentioned in the statute against forcible entries, to be committed for such fine.

Bridg. 173; Cromp. Just. 61; Dalt. 302; Co. Lit. 357. (*a*) That the infant ought not to be imprisoned, because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named. 1 Hawk. P. C. c. 64, § 35.

But neither an infant, nor feme covert, can be guilty of a forcible entry or disseisin, by barely commanding one, or by assenting to one to their use, because every such command or assent by persons under these incapacities is void; but an actual entry by an infant, into another's freehold, gains the possession, and makes him disseisor as well as it does a feme covert.

Crom. 69; Co. Lit. 357; Hawk. P. C. c. 64, § 35.

Two infants joint-tenants, one releases to the other, by which the other holds the whole; this seems a disseisin, because the release being in no manner for the advantage of the infant is utterly void; then the entry of the other being without title is tortious and a disseisin; but, if there had been livery made upon it, though between joint-tenants, this is void; yet it seems no disseisin, for the regard the law has to the solemnity of livery, which shall continue till defeated by act of equal notoriety.

Bro. *Disseisin*, 19.

If a man carries an infant into the lands of J S, and there claims the lands to the use of himself and the infant, yet the infant seems no disseisor, because he made no claim of it himself, and then shall not be charged with the tort of another person.

Roll. Abr. 661.

If an infant be convict in an action of trespass *vi et armis*, the entry must be *nihil de fine, sed pardonatur quia infans ;* for if a *capiatur* be entered against him, it is error, for it appears judicially to the court that he was within age when he appears by guardian ; the like law is, that he shall not be *in misericordiâ pro falso clamore.**

Cro. Ja. 274 ; Hal. Hist. P. C. 21. * The *capiatur pro fine* taken away, and other provisions in lieu thereof. 5 W. & M. c. 12.

General statutes, that give corporal punishment, are not to extend to infants ; and therefore, if an infant be convict in ravishment or ward, he shall not be imprisoned, though the statute of Merton, c. 6, be general in that case ; but this must be understood where it is, as before said, a punishment as it were collateral to the offence, as in the cases before mentioned.

Plowd. 364 ; Hal. Hist. P. C. 21.

But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others ; and this appears by several acts of parliament, (*a*) as by 1 Ja. 1, c. 11, of felony for marrying two wives, &c., where there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years ; so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty.

Co. Lit. 247 ; Hal. Hist. P. C. 21, 22. (*a*)So, by the statute of 21 H. 8, c. 7, concerning felony by servants that embezzle their master's goods delivered to them, there is a special proviso, that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty if above the age of discretion, viz. fourteen years, though under eighteen years, unless a special provision had been to exclude them. Hal. Hist. P. C. 22.——So, by the 12 Ann. c. 7, apprentices, under the age of fifteen years, who shall rob their masters, are excepted out of the act.

Infants are liable for torts and injuries of a private nature ; but if an infant, affirming himself to be of age, borrows 100*l.* and gives his bond for it, and being sued upon the bond, avoids it by reason of his nonage, yet no action lies against him for the deceit ; for though infants shall be bound by actual torts, (*b*) as trespass, &c., which are *vi et armis*, yet they shall not for those that sound in deceit ; for if they should, all the infants in England might be ruined. Adjudged, and judgment arrested after a verdict for the plaintiff in an action upon the case for the deceit.

Johnson v. Pie, 1 Sid. 258 ; 1 Lev. 169, S. C. ; 1 Keb. 905, 913, S. C. (*b*) An account for words lies against an infant of the age of seventeen, for *malitia supplet ætatem.* Noy, 129 ; 7 T. R. 337.

So Where an infant hired a mare, and drove her with such violence, and treated her so cruelly otherwise that she died ; held, that though case would not lie, trespass might be maintained against him.

Campbell v. Stakes, 2 Wend. 137.

Where an infant hired a horse and gig to go to G., but instead of going there went to C., and by severe usage the horse was killed ; held that infancy was a bar to the action.

Penrose v. Carren, 3 Rawle, 351 ; S. P. Wilt v. Welsh, 6 Watts, 9. See Vasse v. Smith, 6 Cranch, 226 ; Jennings v. Randall, 8 T. R. 335 ; Green v. Greenbank, 2 Marsh. 485 ; S. C. 4 E. C. L. R. 375 ; Shenk v. Strong, 1 South. 87 ; Johnson v. Pye, 1 Lev. 169.

(I) Of the Acts of Infants.

An infant at the age of discretion, is liable in an action on the case, for the embezzlement of goods intrusted to his care.

Peigne v. Sutcliffe, 4 M'Cord, 387.

Trover will lie against an infant, when the goods came to his hands under a prior illegal contract.

Lewis v. Littlefield, 3 Shepl. 233.

When an infant commences a malicious prosecution, without probable cause, and prosecutes it after he becomes of full age, he is liable for the injury.

Sterling v. Adams, 3 Day, 411.

Infancy will not protect an executor in a fraudulent execution of his trust.

Loop v. Loop, 1 Verm. 177.

An infant is liable for his trespasses and assaults in the same manner as an adult.

Bullock v. Babcock, 3 Wend. 391.

An infant may create a trust, but if it be tinctured with fraud, he is chargeable with the fraud as if he were an adult.

Piatt v. St. Clair's heirs, 6 Ohio, 239.*g*

So, where an action of deceit was brought for affirming upon the sale of a horse, that it was the defendant's horse, whereas it was the horse of another man, &c., the defendant pleaded infancy; and on demurrer the court, on the first argument, inclined for the defendant; for this action depends upon the contract, and though the contract (it being an actual delivery) be not void, but voidable, and this action he brought upon the wrong, and not upon the contract, yet here by this plea, he shows that he elects to avoid the contract, and then this action falls. And afterwards it was adjudged for the defendant; and the court said, that it was like an action brought against an infant for affirming himself to be of full age.

Grove v. Nevil, Keb. 778; Sid. 258; Lev. 169, S. C. cited.

|| So, where a plaintiff declared, that at the defendant's request he had delivered to the defendant a mare to be moderately ridden, and that the defendant, maliciously intending, &c., wrongfully and injuriously rode the mare, so that she was damaged, &c., it was holden, that the defendant might plead his infancy to it; for the action is founded on a contract, and the plaintiff shall not convert it into a tort.

Jennings v. Rundall, 7 T. R. 335; Green v. Greenbank, 2 Marsh, 485. See acc. Manby v. Scott, *supra*, tit. *Baron and Feme*, (H).||

But, if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury. So, he may be indicted for cheating with false dice, &c.

Sid. 258, *per* Cur.

(I) Of the Acts of Infants as they are good, void, or voidable: And herein,

1. *Of their Contracts for Necessaries.*

Here we must observe, that, strictly speaking, all contracts made by infants are either void or voidable, because the contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from and vacate it when it may prove

prejudicial to them: and where they contract for necessaries they are absolutely bound; and this likewise is in benignity to infants, for if they were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age.

10 H. 6, 14; 18 E. 4, 2; Roll. Abr. 729. * That the contract of an infant is not absolutely void, but only voidable at his *own* election, is a doctrine now settled and established. Burr. 566; 2 Stra. 938; 2 Barnard. K. B. 174.*

Therefore it is clearly agreed by all the books that speak of this matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such (*a*) other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards.

Co. Lit. 172 a, &c. (*a*) If an infant at the age of fifteen marries, he may make a provision for his wife and children. Carter, 215, *arguendo*. β An infant may bind himself for necessaries, if the form of the contract is such that the consideration may be inquired into. Stone v. Dennison, 13 Pick. 1.*g*

β An express promise is not requisite; an implied promise is sufficient. Gay v. Ballon, 4 Wend. 403.*g*

But it must appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's (*b*) degree and estate, which regularly must be left to the jury. But, if the jury find that the things were necessaries, and of reasonable price, it shall be presumed they had evidence for what they thus find; and they need not find particularly what the necessaries were, nor of what price each thing was. Also, if the plaintiff declares for other things as well as necessaries, or alleges too high a price for those things that are necessary, the jury may consider of those things that were really necessaries, and of their intrinsic value, and proportion their damages accordingly.

Cro. Ja. 560; 2 Roll. Rep. 144; Poph. 151; Palm. 361; Gouldsb. 168; Godb. 219; Leon. 114. (*b*) That the law distinguishes between persons as to necessaries; as between a nobleman and a gentleman's son: also, in point of time and education, the law distinguishes; as at school, Oxford, and inns of court; and that he is not to be looked upon in the same condition when a school-boy, as when of riper years. Carter, 215. ‖An infant, a captain in the army, held liable to pay for his servant's livery, his situation requiring such an attendant. Hands v. Slaney, 8 T. R. 578.‖—— Velvet and satin suits laced with gold held not necessary ‖ for a defendant, who was written in the declaration only gentleman, and was attending on the Earl of Essex in his chamber. Mackerell v. Bachelor, Gouldsb. 168; Cro. Eliz. 583, S. C.; 1 M. & S. 741, S. C. cited by Lord Ellenborough.‖ β Whether articles furnished for an infant are of the classes for which he is liable, is matter of law; whether they were actually necessary, and of reasonable prices, is matter of fact. Beeler v. Young, 1 Bibb, 519. It has been holden that a horse is not, in general, within the denomination of necessaries for which an infant is liable. Rainwater v. Durham, 2 Nott & M'Cord, 524.*g*

If an infant promises another, that if he will find him meat, drink, and washing, and pay for his schooling, he will pay 7*l.* yearly; an action upon the case lies upon his promise: for learning is as necessary as other things; and though it is not mentioned what learning this was, yet it shall be intended what was fit for him, till it be shown to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good.

Roll. Abr. 729; Palm. 528; Jon. 182, S. C. Pickering v. Gunning, adjudged on a motion in arrest of judgment.

Assumpsit for labour and medicines in curing the defendant of a distemper, &c., who pleaded *infra ætatem viginti et unius annorum;* the plaintiff replied it was necessaries generally; and upon a demurrer to this replication, it was objected, that the plaintiff had not assigned in certain

how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good.

Huggins v. Wiseman, Carth. 110.

||To assumpsit for a farrier's bill, the defendant pleaded infancy; the plaintiff replied, necessaries for the defendant's horses; on demurrer, the replication was adjudged ill; it should have been necessaries for the use of the defendant, or for the horses kept by defendant for his necessary use.

Clowes v. Brooke, 2 Str. 1101; Andr. 276, S. C.||

If an infant be a mercer, and have a shop in a town, and there buy and sell, and contract to pay a certain sum to J S for certain wares sold to him by J S to re-sell, yet he is not chargeable upon this contract; for this trading is not immediately necessary *ad victum et vestitum;* and if this were allowed, infants might be infinitely prejudiced, and buy and sell and live by the loss.

Hill v. Whittingham, Roll. Abr. 729; Cro. Ja. 494, S. C.; 2 Roll. Rep. 45, S. C. adjudged; Whywall v. Champion, 2 Str. 1083, S. P.; Dilk v. Keighly, 2 Esp. N. P. C. 400, S. P.

And as the contract of an infant for wares, for the necessary carrying on his trade, whereby he subsists, shall not bind him; so neither shall he be liable for money which he borrows to lay out for necessaries; and therefore the lender must, at his peril, lay it out for him, or see that it is laid out in necessaries.

5 Mod. 368; Salk. 386; Ld. Raym. 344.

As in debt upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessaries, viz., 10*l.* for clothes, and 15*l.* money lent *pro et erga* his necessary support at the University; the defendant rejoined, that the money was lent him to spend at pleasure; *absque hoc*, that it was lent him for necessaries; and issue hereupon was found for the plaintiff, who had judgment in C. B., but it was reversed in B. R. on a writ of error; for the issue only being, whether this money was lent the infant for necessaries; not whether it was laid out in necessaries, it cannot bind the infant which ever way it is found; for it might have been borrowed for necessaries, and laid out in a tavern; and the law will not intrust the infant with the application and laying of it out.

Salk. 386, Earl v. Peale. βAn infant is liable on a note not negotiable, or even on a negotiable note for necessaries, while it remains in the hands of the payee. Dabose v. Wheddon, 4 M'Cord, 221.*g*

β If an infant purchase necessaries and give his promissory note signed by himself and a surety, and the surety afterwards pays the note, he is entitled to recover the amount so paid of the infant.

Coon v. Coburn, 7 N. H. Rep. 368.*g*

So, if one lends money to an infant, who actually lays it out in necessaries, yet this shall not bind the infant, nor subject him to an action; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries will not by matter *ex post facto* entitle the plaintiff to an action.(*a*)

Salk. 279. (*a*) [But in Marlow v. Pitfield, 1 P. Wms. 559, the Master of the Rolls held, that if one lends money to an infant to pay a debt for necessaries, and in consequence thereof he does pay the debt, the infant shall be liable in equity; for the lender of the money stands in the place of the person paid, viz. the creditor for necessaries, and shall recover in equity, as the other should have done at law.]

Also, although an infant shall be liable for his necessaries, yet if he enters

into an obligation with a penalty for payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the infant.

Cro. Eliz. 920; Moore, 679; Co. Lit. 172; Roll. Abr. 729. ‖ *A fortiori* then, where the bond is conditioned for the payment of *interest* as well as principal. Fisher v. Mowbray, 8 East, 330. Such a bond cannot be set up by matter *ex post facto* after full age; it is merely void; for it is upon the face of it to the infant's prejudice. Baylis v. Dineley, 3 M. & S. 477; Keane v. Boycot, 2 H. Bl. 515.‖

It is also said, that an infant cannot either by a parol contract or a deed bind himself, even for necessaries in a sum certain; and that should an infant promise to give an unreasonable price for necessaries, that would not bind him; and that therefore it may be said, that the contract of an infant for necessaries, *quatenùs* a contract, does not bind him any more than his bond would; but only since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessaries.

Cases in Law and Eq. 185.

Yet it hath been (*a*) adjudged, and is admitted in several (*b*) other books, that if an infant contracts for necessaries, and enters into a single bill for payment, that this shall bind him, and that an action of debt will lie on such obligation.

(*a*) Lev. 86, Russel and Lee, adjudged; Keb. 382, 416, 423, S. C. (*b*) Co. Lit. 172, S. P., and diversity taken between a single obligation and an obligation with penalty. Cro. Eliz. 910, S. P., and same diversity *per Curiam*. Roll. Abr. 729, S. P., though thereby the defendant is ousted of his wager of law. *β* See M'Minn v. Richmonds, 6 Yerg. 9.*g*

So, an infant may bind himself in an *assumpsit*, for payment of necessaries, and an action upon the case lies against him upon the promise for this, but in nature of an action of debt; and therefore where debt lies, an action on the case lies against him.

Roll. Abr. 729; Noy, 85; Latch. 157, and vide 3 Buls. 188; Roll. Rep. 328.

Also, it seems clear, that if an infant becomes indebted for necessaries, and the party takes a bond from the infant, that this shall not drown the simple contract, because the bond has no force.

Cro. Eliz. 920.

But it is agreed, that an *insimul computasset* will not lie against an infant, though it be for necessaries; for he, not having discretion, is not to be liable to false accounts.

Co. Lit. 172; Latch. 169; Noy, 87; [Trueman v. Hurst, 1 T. R. 40.]

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party should be paid as much as his board and schooling are worth. But, if the infant at the time of his going thither was under the age of discretion; or, if he were placed there upon a special agreement with some of the child's friends; the party that boards him has no remedy against the infant, but must resort to those with whom he agreed for the infant's board, &c.*

Allen, 94, Duncomb v. Tickridge. * It hath of late years been several times determined, that where a parent or relation, &c., places an infant at a boarding-school, the credit being given to such parent, relation, &c., the master cannot have any remedy against the infant.—[And an infant who lives with, and is properly maintained by his parents, cannot bind himself to a stranger for what might otherwise be allowed as necessaries. Bainbridge v. Pickering, 2 Bl. Rep. 1325.] ‖ And where an infant during his residence at a coffee-house contracted a debt with a tailor for wearing apparel, Lord Kenyon expressed an opinion, that it was the duty of the tradesman to inquire into the situation of the infant, and to learn from the parent whether the infant was in want of the articles ordered, or not; and unless the tradesman could show that he had made

such inquiry, he was not entitled to recover. Ford v. Fothergill, Peake's N. P. C. 229; 1 Esp. N. P. C. 211, S. C. However, even in a case where the infant was living with his parent, and the issue in a suit against him is upon *necessaries*, if any part of the articles proved to have been furnished to him may fall within that description, the evidence ought to be left to the jury. Maddox v. Miller, 1 M. & S. 738.‖

[As necessaries for an infant's wife are necessaries for him, he is chargeable for them, unless provided in order for (*a*) the marriage, in which case he is not chargeable, though she uses them afterwards.

Turner v. Trisby, 1 Str. 168. (*a*) ‖ The case supposes they were provided by the wife's relations for the marriage; for if taken up by the wife herself, the husband must pay for them; *transit cum onere.*‖

An infant is also liable to an action for the nursing of his lawful child; *nam persona conjuncta æquiparatur interesse proprio.*]

Lord Bacon's Max. Reg. 18.

‖An infant cannot bind himself for necessaries when he has a parent or guardian to supply his wants.

Guthrie v. Murphey, 4 Watts, 80; Edwards v. Higgins, 2 M'Cord's Ch. 16; Kline v. L'Amoureux, 2 Paige, 419; Wailing v. Todd, 9 Johns. 141; Cook v. Denton, 3 Car. & P. 114; Burghart v. Angerstein, 6 Car. & P. 690; Mortara v. Hall, 6 Sim. 465.

The articles furnished as necessaries for which an infant is bound, need not be articles of absolute necessity to support life.

Rundell v. Keeler, 7 Watts, 237; Watson v. Hensell, 7 Watts, 334. See Charters v. Bayntun, 7 Car. & Payne, 52.

An infant rented a house and exercised therein his calling as a barber; held, that it was properly left to the jury whether it came in the term of necessaries.

Lowe v. Griffiths, 1 Scott, 458; 1 Hodges, 30.‖

‖ Though an infant partner in trade is not liable as a partner during his infancy, yet, where he holds himself out as a partner, and continues to act as such till within a short period of his attaining twenty-one, it is his duty to notify his disaffirmance of the partnership after attaining twenty-one; and if he neglect to do so, he is responsible to the persons who trust the partnership with goods *subsequently* to the infant's attaining twenty-one, on the credit of the partnership.

Goode v. Bennion, 5 Barn. & A. 147.

An infant, captain in the army, is liable to pay for a livery ordered for his servant, as necessaries proper for one in his condition of life; but not for cockades ordered for the soldiers of his company.

Hands v. Slaney, 8 Term R. 578.

A replication to plea of infancy, averring that the infant, after the promises, attained twenty-one, and that before the exhibiting the bill he ratified the promises, is good *after verdict*, though it does not allege that the infant ratified after he came of age.

Cohen v. Armstrong, 1 Maule & S. 724.

A promise made subsequent to the commencement of the action, is not sufficient to sustain a replication that the infant ratified after he came of age.

Thornton v. Illingworth, 2 Barn. & C. 824.

If an infant pays money with his own hand, without a valuable consideration, he cannot recover it back again.

Holmes v. Blogg, 8 Taunt. 508; Wilmot's notes, 177, 226, n.

An infant cannot be bound, by any article entered into during minority, as to her real estate, but may refuse to be bound, and abide by the interest

the law casts upon her, which nothing but her own act, after the period of her majority, can fetter or affect.

Clough v. Clough, 5 Ves. 717.

An infant suitor is bound by laches in the suit.

Shipbrooke v. Hinchinbrooke, 13 Ves. 386; and see 3 Madd. 494.

Where an infant, by solicitation, obtained from his trustees a transfer of part of his stock, a few months before he came of age, and after coming of age received a transfer of the residue, and then assigned all his property to two creditors who had struck a docket against him, they agreeing not to prosecute the docket; this was held a fraud in the infant; and that by receiving the residue of the stock when of age, he recognised the previous transfer; and therefore, and because the agreement was contrary to the spirit of the bankrupt laws, the two assignees of the infant were held not entitled to call for a repayment of the money paid during the infancy.

Cory v. Gertchen, 2 Madd. R. 40; and see 4 Ves. 365.

An infant of seventeen appoints a guardian by deed; this does not preclude an application to the court to appoint a guardian.

Curtis v. Rippon, 4 Madd. 462.

Where A, an infant, was articled to an attorney, with a proviso that he should not practise at any time within certain limits, and a covenant by his father, that, within a month after his full age, he should execute a bond accordingly, and the infant served upon the articles three years after his full age, and with knowledge of the purport of his articles, an injunction to restrain him from practising within the limits, contrary to the articles, was refused with costs.

Capes v. Hutton, 2 Russ. R. 357.

With respect to infant trustees and mortgagees (vide p. 133,) the statute 7 Ann. c. 19, and also the 4 G. 3, c. 16, are repealed by the 6 G. 4, c. 74, intituled, *An Act for consolidating and amending the laws relating to conveyances and transfers of estates and funds vested in trustees, who are infants, idiots, lunatics, or trustees of unsound mind, or who cannot be compelled, or refuse to act, and also the laws relating to stocks and securities belonging to infants, idiots, lunatics, and persons of unsound mind.* But as to proceedings commenced under the repealed acts, before the passing of the new act, they may be proceeded in according to the provisions of the repealed acts, or of the new act, as may be most expedient.

See, under tit. *Idiots and Lunatics, antè*, the 1 W. 4, c. 65, which partially repeals the 6 G. 4, c. 74.

And by § 2, it is enacted, that when any person, seised or possessed of any lands, &c., or other property, or any estate or interest therein, upon any trust, or by way of mortgage, shall be under twenty-one, it shall be lawful for such infant, by direction of the Court of Chancery or Exchequer, or of the Duchy Chamber of Lancaster, or Exchequer of the county palatine of Chester, or the Chancery of the county palatine of Lancaster or Durham, or the Courts of Great Session in Wales (if the lands are situate in the jurisdiction of these courts respectively,) to convey, release, surrender, assign, or otherwise assure such lands, &c., to such person and in such manner as the said courts respectively shall direct; and every such conveyance, &c., shall be as effectual as if the infant executing the same were of full age.

And by § 9, all such infants, idiots, &c., shall and may be empowered

and compelled, by the order thereinbefore mentioned, to make such conveyance, assurance, &c., in like manner as trustees of full age and sound mind are compellable to convey, assure, &c.

A person is liable on a bill of exchange accepted after he was of age, though drawn while he was an infant.

Stevens v. Jackson, 4 Camp. 164.

But if goods are delivered to a carrier by the vendor, addressed to the purchaser, while the latter is under twenty-one, but they do not reach him till he has attained twenty-one, infancy is a good defence to an action for the price; for the goods vested in him immediately on delivery to the carrier, and he might have been sued immediately.

Griffin v. Langfield, 3 Camp. 254.

The testamentary guardians of an infant sold part of his estates for the purpose of redeeming the land-tax under 38 G. 3, c. 60, by which, in cases of sales of estates of infants for the purposes of that act, it is provided, that the purchase money shall be paid into the Bank of England in manner therein directed. The purchaser of part of the property paid his purchase-money to the agent of the vendor, who was also agent to the purchaser, and the conveyance was executed. The agent did not pay the money into the bank, but misapplied it. The purchaser entered into possession, and continued in such possession for many years, paying, however, the land-tax. The heir at law, upon his attaining twenty-one years, settled accounts with his guardians, and afterwards continued to employ the same agent, with whom he some years afterwards settled an account; and for the balance, including the purchase-money, took from such agent a security, which, however, proved valueless. Nearly twenty years after attaining his age, the heir brought an ejectment against the purchaser; to restrain which, and to obtain a confirmation of the contract, the purchaser filed his bill. The court dismissed the bill, but without costs.

Hicks v. Morant, 3 Young & J. 286.‖

2. *Of judicial Acts, or Acts done by him in a Court of Record.*

As to judicial acts, and acts done by an infant in a court of record, they regularly bind the infant and his representatives, with the following savings and exceptions; as, if an infant levies a fine, though the judges ought not to admit the acknowledgment of one under that disability, yet having once recorded his agreement as the judgment of the court, it shall for ever bind him and his representatives, unless he reverses it by writ of error, which must be brought by him during his minority, that the court by inspection may determine his age.

Co. Lit. 380; Moore, 76; 2 Roll. Abr. 15; 2 Inst. 483; 2 Buls. 320; 12 Co. 122; Yelv. 155; 3 Mod. 229. β The appearance of an infant to a suit brought against him is not a judicial act, and is fatal on error. Sliver v. Shelbark, 1 Dall. 165; Moore v. M'Ewen, 5 S. & R. 373; Castledine v. Mundy, 1 Nev. & M. 635, 4 B. & Adol. 90. γ

So, if an infant levies a fine, he is enabled by law to declare the uses thereof, and if he reverseth not the fine during his nonage, the declaration of uses will stand good for ever; for though that be a matter *in pais*, and all such acts an infant may avoid at any time after his full age, if he do not consent; yet being made in pursuance of the fine levied, which fine must stand good for ever, (unless reversed in the manner which has been mentioned,) so will the declaration of the uses too.

2 Co. 58 a; 10 Co. 42; Moore, 22; Dalf. 47; 2 Leon. 159; Gouls. 13; Jones, 390; Winch. 103, 104.

If there be tenant for life, the remainder to an infant in fee, and they two join in a fine, the infant may bring a writ of error, and reverse the fine as to himself, but it shall stand good as to the tenant for life, for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual.

Leon. 115, 317; 2 Sid. 55; 2 Jones, 182; 3 Burr. 1802; Pigot v. Russell, H. 30 El. cited in Moore, 565.

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court, but before the fine reversed he levies another fine to another, this second fine shall hinder him from reversing the first; because the second having entirely barred him of any right to the land, must also deprive him of all remedies which would restore him to the land.

Roll. Abr. 788.

If an infant levies a fine, and the conusee renders to him either for life or in tail, it is said that he shall have no writ of error to avoid this fine; because the reversal of the fine being only to restore him to the land he parted with by the fine, it would be fruitless to give him a writ of error, since he could not thereby be restored to the land, which the very fine he would endeavour to reverse, had before given him.

Moore, 74, but *quære.*

As to recoveries suffered by infants, when these were improved into a common way of conveyance, it was thought reasonable, that those whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais;* and therefore, if an infant suffers a recovery, he may reverse it as he may a fine, by a writ of error, during his minority. And this was formerly taken to be law, as well where the infant appeared by guardian, as by his attorney, or in person. But now the distinction turns upon this point, that if an infant suffers a recovery in person, it is erroneous, and he may reverse it by writ of error; but even in this case, the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court; for at his full age it becomes obligatory and unavoidable. But in cases of necessity the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee. But this too is seldom allowed by the court, unless it be upon emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him, and when he has had the king's privy seal for that purpose; and these recoveries have been allowed and supported by the judges, and the infant could not set them aside or shake them. Besides, if such recoveries be to the prejudice of the infant, he has his remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law had committed the care of him.

Roll. Abr. 731, 742; Co. Lit. 381 b; 2 Roll. Abr. 395; 10 Co. 43 a; Cro. Eliz. 471; Hob. 196, 197; Cro. Car. 307; 2 Bulst. 235; Sid. 321, 322; Lev. 142; 2 Saund. 94; Vern. 461; 2 Salk. 567.

Partition by writ *de partitione faciendâ* binds infants because by judgment in a court of justice, to which no partiality can be imputed.

Co. Lit. 171 b. [A decree in equity for the benefit of an infant, will bind him: nor shall his executor dispute such decree, though it may be for his advantage to do so. 1 Atk. 631.] Vide *infra,* (K) 1.

If an infant acknowledge a recognisance or statute, it is only voidable; and the infant, at his peril, must avoid them by *audita querela*, as he must a fine or recovery by writ of error during his minority; for such conveyances, or other acts of record, become obligatory and unavoidable, if they be not set aside before the infant comes of age. The reason is, because these contracts being entered into under the inspection of the judge, who is supposed to do right, the infant cannot against them aver his disability, but must reverse them by a judgment of a superior court, which by inspection hath the same means to determine whether the inferior jurisdiction has done right that first received the contract.

Moore, pl. 206; 2 Inst. 483, 673; Co. Lit. 380; Keilw. 10; Reg. 149; 10 Co. 43 a.

If an infant bargain and sell his lands by deed indented and enrolled, yet he may plead nonage; for notwithstanding the statute 27 H. 8, c. 16, makes the enrolment in a court of record necessary to complete the conveyance, yet the bargainee claims by the deed as at common law, which was, and therefore still is, defeasible by nonage.

2 Inst. 673.

3. *Of his Act* in Pais, *where void or only voidable.*

β The law regards the interests of minors with a paternal solicitude, and its provisions for their protection will be strictly enforced.

Bernard v. Vignaud, 1 N. S. 62; Bank of the United States v. Ritchie, 8 Pet. 128.*g*

Infants are, regularly, allowed to rescind and break through all contracts *in pais* made during minority, except only for schooling and necessaries, be they never so much to their advantage. And the reason hereof is, the indulgence the law has thought fit to give infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing them from being imposed upon or over-reached by persons of more years and experience.

29 E. 3, 20 b; Roll. Abr. 729; Co. Lit. 172, 381 βAll contracts made by infants against their interest are void, and all contracts made with a semblance of advantage are voidable. Rogers v. Hurd, 4 Day, 57. See Maples v. Wightman, 4 Conn. 376. But equity will support contracts which are beneficial to them. Rudford v. Westcott, 1 Desaus. 596. And when a contract has been made by his guardian for the benefit of the infant, and to save an estate otherwise in danger of being lost, equity will enforce its performance. Roberts v. Wilson, 2 Bibb, 334.*g*

β A relinquishment of dower by a *feme covert* infant, is an act *in pais*, and may be avoided on arriving at full age.

Oldam v. Sale, 1 B. Monroe, 77.*g*

And for the better security and protection of infants herein, the law has made some of their contracts absolutely void, *i. e.* all such, in which there is no apparent benefit, or semblance of benefit to the infant; but as to those from which the infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them when they come of age, and are capable of considering over again what they have done, either to ratify and affirm such contracts, or to break through and avoid them.

Cro. Car. 502; Jones, 405; 3 Mod. 310. [It was laid down by Lord Mansfield as a general principle, in Drury v. Drury, 5 B. P. C. 570, *that if an agreement be for the benefit of an infant at the time, it shall bind him.* And this rule hath been adopted in subsequent cases. 2 T. R. 159.]

Hence it hath been agreed, that an infant may purchase, because it is

intended for his benefit, and that at his full age he may either agree or disagree to the same.

Co. Lit. 2, 8; 2 Vent. 203. βA minor having purchased his time from his father, is entitled to his own earnings, against his father's creditors. 2 Verm. Cas. 290; United States v. Mertz, 2 Watts, 408; Galbraith v. Black, 4 S. & R. 207.g

Also, the feoffment of an infant is not void, but only voidable, not only because he is allowed to contract for his benefit, but because that there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him.

Co. Lit. 380; Dyer, 104; 2 Roll. Abr. 572; 4 Co. 125 a; 8 Co. 42.

Therefore, if an infant make a feoffment and livery in person, he shall have no assize, &c., but must avoid it by (*a*) entry; for it is to be presumed in favour of such solemnity, that the assembly of the *pais* then present would have prevented it, if they had perceived his nonage, and therefore the feoffment shall continue till defeated (*b*) by entry, which is an act of equal notoriety.*

Bro. tit. *Disseisin*, 63. βA feoffment by an infant is voidable, but all other conveyances *in pais* are void or voidable at his election. Dearborn v. Eastman, 4 N. H. Cas. 441; Kline v. Beebe, 6 Conn. 494; Bool v. Mix, 17 Wend. 119; Eagle Fire Company v. Lent, 6 Page, 635; White v. Flora, 2 Tenn. 431.g (*a*) He may avoid his feoffment by entry during his minority, but must not have the writ *dum fuit infra ætatem* till his full age, F. N. B. 192; Co. Lit. 380; Show. P. C. 153; Co. Lit. 247 a, [for the judgment would bind his election. 3 Burr. 1808.] (*b*) But, if an infant exchanges with another, if the other enters, the infant may have an assize. 18 E. 4, 2; Roll. Abr. 730.——* If an infant makes a feoffment, or conveys, by lease and release, and re-enters within age, still the feoffment or conveyance is only voidable, and he may elect to confirm it, when of full age; therefore a stranger cannot avail himself of the infant's entry, for he cannot elect for him. 3 Burr. 1794.

But, if the infant had made a letter of attorney to deliver seisin, he might have an assize, &c., because the letter of attorney, like all other acts or agreements made by an infant to his (*c*) prejudice, must be void; and therefore whoever claims under it, or by virtue of its authority, (*d*) must be a wrong-doer.

2 Roll. Abr. 2; Noy, 130; Palm. 237. (*c*) But a feoffment to an infant, with a letter of attorney by him to accept livery, is said to be only voidable, because for the infant's benefit. Roll. Abr. 730. (*d*) That the attorney who executes it is a disseisor. Roll. Rep. 242.

So, if an infant enfeoffs his guardian, this is void, for the apparent prejudice it must be to the infant.

35 Ass. 8; Roll. Abr. 728; βStock v. Stock, 1 Desaus. 191.g

If an infant make a lease for years, reserving rent, it seems agreed, that such a lease is only voidable by the infant.

Vide head of *Leases and Terms for Years.*

But, if he make a lease for years, without reservation of any rent,* it seems by the opinion of the greater number of the books, that from the apparent prejudice and hurt it must be to the infant, such lease is absolutely void. But this point does not appear to have been ever judicially determined; and indeed the reasons against it seem very cogent, and that it would be a greater indulgence to the infant, and more for his service, to allow him when he comes of age, and is capable of considering over again what he has done, either to ratify and affirm all his contracts, or to break through and avoid them; and that this power should be extended to all leases and contracts made by infants during their minority, as well to those which are for their benefit and advantage, as to those which apparently tend

to their hurt and prejudice; for if it were to be confined only to the last, it would exclude them from being judges of either, since no man can be supposed to know what is to his disadvantage, but as he is allowed to compare it with such things as are for his advantage and good; and therefore the power of judging in general must be left to him; and, as a consequence thereof, it should seem that he may, when he comes of age, either affirm or avoid all leases or contracts made by him during his minority, according as he judges them to be beneficial or hurtful to him, without any intervening judgment of law to condemn some only, and leave others to the infant's discretion, when he comes of age. And the giving of infants such power in general over all their contracts will sufficiently secure them against the danger of being imposed on, or over-reached by others. For when the power is general, and all persons who deal with infants know they are to be at their mercy, when they come of age, whether they will think fit to stand to their bargain, or not, this will take off from the temptation of imposing upon them; or if any should be so hardy as to do it, yet since the infant is at liberty, when he comes of age, to rescue himself by avoiding such injurious contract, there seems no possible mischief in the mean time to suffer such contract to hang *in equilibrio*, and defer pronouncing any sentence upon it, since that, as hath been said, would curtail the infant's power, and take off from his freedom of judging at all. Besides, that the very reason of giving to infants such power was to secure them against the imposition of others, which a lease for years, reserving the full rent, cannot be supposed to be; and therefore, if they were only to use it in such cases, it would be useless; and if they were denied it in the other, where no rent at all is reserved, (as they must be, if the law pre-judges for them,) it would be no power at all in them, or at most but an empty and idle one. Therefore, it seems by the stronger reasons, if an infant make a lease for years, without reservation of any rent, though this is apparently to his hurt and prejudice whilst he continues a minor; yet since when he comes of age he may either by assize or trespass recover the possession and mesne profits, and so make it whole *ab initio*, the lease is good in the mean time. And the rather, because most of the books agree, that if a rent were reserved on such lease, it would then be only voidable; whereas such rent may be so small in proportion to the value of the land, that there may be more reason to adjudge it absolutely void, than if none at all were reserved; because in the one case the imposition is apparent, but in the other it may be so misrepresented and coloured over as to deceive the infant, even when he comes of age, into some unwary act of ratification of it. Besides that, the infant when he comes of age may, if he think fit, make such lease for years without reserving any rent; and why then may he not consent to, and ratify such lease, though made before, which (if the law permitted him) he might do by accepting fealty, which is incident to every such lease?

Moore, 105; 2 Leon. 216; Noy, 130; Co. Lit. 45, 308 a; Jones, 157; 4 Leon. 4; Brownl. 120; Hutton, 102; Roll. Rep. 441; Lev. 6; Mod. 263; 3 Mod. 310. *A lease on which no rent is reserved is not *absolutely* void. An infant may make a lease without rent, to try his title. 3 Burr. 1806.—The lessee cannot, in any instance, avoid the lease on account of the lessor's infancy, therefore it is not void. Ibid. [Clayton v. Ashdown, Vin. Abr. tit. *Enfants*, G. 4, pl. 1.]

As to the books before cited, that a lease for years by an infant without any reservation of rent should be absolutely void, they are only *obiter* opinions; and there is but one case where it is expressly so holden, and there only by two judges; for Gaudy was of another opinion, and the

judgment there given was upon the right and merits of the case, not upon the point of the lease, though the two judges, to enforce the judgment for the defendant, would have the infant's lease to the plaintiff, upon which the ejectment was brought, to be absolutely void, and so no title at all against the defendant, who was in possession. Besides, the lease there was by parol, not by deed, which may make a considerable difference.

Moore, 105; 2 Leon. 216, 218.

Another case, produced to enforce the reason of such leases being absolutely void, is, that a surrender by an infant to him in reversion hath been adjudged to be absolutely void, whether it were a surrender in law by taking a new lease, or an express surrender, and that no agreement by him at full age should make it good, so as to establish the second lease. And the reason there given was, because there being no increase of his term, or decrease of the rent, the surrender was absolutely void at first. But there seems a much better reason for the judgment given in that case; for the first lease was made 1 E. 6, by a dean and chapter for fifty years, and this lease being afterwards assigned to infants, they, 29 Eliz., took a new lease of the same lands from the then dean and chapter for the same term, and under the same rent and covenants as were in the first; but this second lease not being warranted by 13 Eliz., c. 10, the succeeding dean and chapter would have avoided it, and so stripped the infants of any interest at all in the lands; to prevent which mischief, and help the infants, the court gave judgment against the surrender, that it was absolutely void, *ab initio*, and so the second lease never good. And this was but a just construction as this case was; for if the court had adjudged the surrender to have been only voidable, then the infants' agreement to the second lease when they came of age, would have made the surrender of the first absolute, and then their title standing only upon the second lease, and that not warranted by 13 Eliz. c. 10, they would have been defeated of both; which would have been a very severe construction in a case of this nature where the operation of the law in working the surrender of the first lease might be easily supposed not to be thought of or understood by them.

Cro. Car. 502; Jones, 405; Roll. Abr. 728, Lloyd and Gregory. An infant may surrender leases in a court of equity in order to renew the same by stat. 29 G. 2, c. 31.

Another case produced is of a surrender by a person *non compos*, *&c.*, who being tenant for life, with remainder to his first and other sons, did before the birth of any son surrender to him in the remainder, with intent to destroy the contingent remainders to his sons; but it was adjudged, that the surrender was absolutely void *ab initio*, and by consequence, the contingent remainders not hurt thereby. And there, it was said, that the grants of infants and of persons *non compos* were parallel both in law and reason; and the preceding case was cited as an authority in point, that a surrender by an infant was *ipso facto* void, and so of a person *non compos*, &c. But the case of an infant has already received an answer; and this of the *non compos* may be easily answered too; for if the surrender should have been allowed, it would have been not only prejudicial to himself, but likewise to all his sons after born, who were strangers or third persons; and there could be no use made of the surrender but to do them mischief, which the acts of a madman ought not to be allowed to do, when by a reasonable construction it is in the power of the court to help them, as in that case they did, by adjudging the surrender to be absolutely void, rather than voidable. So that notwithstanding the cases above cited, it does not seem clear that

the lease of an infant, without reservation of any rent, is absolutely void, but rather voidable, since his power of avoiding it when he comes of age sufficiently guards him against the unreasonableness or practice of others, the only mischief, which the introducing of this law in favour of infants designed at first to obviate and prevent.

Show. Parl. Cases. 153; 3 Mod. 310; 2 Salk. 427; Ld. Raym. 313; Show. 296; Comyn, 45; 12 Mod. 174; 3 Salk. 300, 576; Carth. 211, 435; Comb. 439, S. C.; Thomson v. Leach, 3 Burr. 1807.

Also, it hath been holden, that if an infant grant a rent-charge out of his land, this is not absolutely void, but only voidable by him when he comes of age; for if the grantee should then distrain for the rent, though the other may bring an action of trespass, yet he cannot plead *non concessit;* for the deed is only voidable (*a*) by showing his infancy, and not void, because it was delivered with his own hands.

Trin. 6 Annæ, in B. R. Hudson v. Jones. But in 3 Mod. 310, it is said *per Cur.* that if an infant grants a rent-charge out of his lands, it is not voidable, but *ipso facto* void; and that if the grantee distrain for the rent, the infant may have an action of trespass against him. (*a*) That to a lease for years made by an infant, he can in no case plead *non est factum*, but must avoid it by pleading the special matter of his infancy. 5 Co. 115; 2 Inst. 483; Cro. Eliz. 127; Moore, pl. 132; Poph. 178.

Copyhold was granted to one for life, remainder to an infant in fee; they both join in a surrender to one, who was admitted; then the tenant for life dies, and after the infant dies, and his heir enters; and it was adjudged that he might well enter, without being put to the writ of *dum fuit infra ætatem;* for such surrender was but a conveyance by matter *in pais*, which cannot bind an infant, but that he or his heirs may enter, or bring trespass before admittance.

Cro. Eliz. 90, Knight v. Fortipan; and vide Cro. Car. 103.

If there be two coparceners, and one of them an infant, and they make an unequal partition, this shall not bind the minor; for though partition, if equal, will bind an infant, because compellable to make partition; (and whatever one is compellable to do, may be done by the same person voluntarily;) (*a*) yet when the partition is unequal, and the less part allotted to the minor, this shall not bind her; for then the security the law has provided for infants, to prevent them from being over reached, would be useless.

Lit. § 258; Co. Lit. 171. (*a*) 3 Burr. 1801. ‖ See Lord Brook v. Lord Hertford, 2 P. Wms. 518; Tuckfield v. Buller, Ambl. 197, *infra.*‖

But yet such unequal partition is not absolutely void, but the infant has election either to affirm it at full age, by taking the profits of the unequal part allotted to her, or to avoid it, either during her minority, or at full age, by entry into the other part with her sister.

Co. Lit. 171.

[Anne May, and her two sisters were, under their father's will, seised of a considerable freehold estate, and possessed of a considerable leasehold estate, as joint-tenants. Previous to the marriage of Anne May with the defendant John Hook, she being then an infant, by articles of agreement dated 28th Oct. 1761, and made between her of the first part, John Hook of the second part, and trustees of the third part, it was covenanted and agreed, that the leasehold estates should be assigned to John Hook for his own use and benefit, and that the freehold estates should be settled on him for life; and then on her for life; remainder to their first and other sons successively in tail-male; remainder to their daughters as tenants in common in tail; remainder to John Hook in fee.

And John Hook covenanted to pay 100*l.* to the trustees, upon trust, to pay Anne May if she survived him, the interest of it for her life, and after her death to divide it among the children.—Anne May died under age. The question was, whether these articles were in equity a severance of the joint-tenancy? Lord Chancellor Bathurst, when he made his decree in this cause, observed, that the first point attempted to be established by the counsel was, that had Anne May been of full age, when she entered into the articles, they would have amounted to severance; but that no determination to that effect had ever been made: that the co-joint-tenants were not, in this case, to be considered as volunteers, as they claimed by title paramount; and that their situation approached nearer to that of the issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor: that the utmost which an infant could do, would be an avoidable act; and that, of course, it would be in the discretion of the court either to give or refuse their assistance to it, and, by a parity of reason, it must be in their power to model his contracts at their pleasure: that the contract in the present case was not such as the court would uphold. Had the infant lived to come of age, and a bill been filed against her for performance of the articles, the court would have set them aside, and referred it to the master to draw new proposals for a proper settlement: that as the contract was not such as would have bound the infant, *a fortiori* it should not bind the co-joint-tenants: that it would be a strange doctrine that any act of an infant, which by its nature is voidable, should sever the joint-tenancy, as, if that were allowed, it would always be in the power of the infant to say, whether the joint-tenancy should be severed or not; then, if any of the co-joint-tenants should die under age, the infant might avoid his own act by pleading *infra ætatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the survivor.—On these grounds his lordship was of opinion, that the articles did not in equity amount to a severance of the joint-tenancy.
May v. Hook, in Chanc. 1773; Co. Lit. 13th edit. 246, note 1.]

|| It was formerly much doubted, whether a jointure settled on an infant before marriage, was a bar to dower. But it hath been since determined, that such a jointure is good, and that the wife cannot waive it after her husband's death, and claim dower. Sir Thomas Drury, previous to his marriage with Miss Tyrrel, who was then an infant, by indenture made between him of the first part, Miss T. of the second part, and two trustees of the third part, agreed, that Miss T. in case the marriage should take effect, and she should survive him, should have an annuity of 600*l.* during her life, for her jointure, and in bar of dower, and Sir T. D. covenanted with the trustees that his heirs, executors, and administrators would pay the annuity. The deed was executed by Miss T. in the presence of her guardian, who was a subscribing witness to it, and the marriage was soon after solemnized, with his privity and consent. Miss T. was entitled only to a portion of 2000*l.* Sir T. D. died seised of a considerable real and personal estate; and upon his death Lady D. insisted, that as she was an infant at the time of executing the settlement, she was not bound to accept the provision thereby made for her; but was entitled to dower. The heirs of Sir T. D. filed a bill in Chancery against her, praying that she might be restrained from claiming dower. The cause was heard before Lord Henley, who decreed, that she was entitled to dower. On an appeal to the House of Lords, the following question was put to the judges: "Whether a woman, married under the age of

21 years, having before such marriage a jointure made to her in bar of her dower, is thereby bound, and barred of dower within the statute of 27 H. 8, c. 10." The judges were divided: three of them, viz., Pratt, Ch. J., C. P. Parker, C. B., and Gould, B., delivered their opinions in the negative; but Wilmot, J., Bathurst, J., Adams, B., and Smythe, B., in the affirmative. Lord Hardwicke and Lord Mansfield also delivered their opinions in the affirmative; whereupon the decree was reversed.

1 Cruise's Dig. 227; Drury v. Drury, 2 Eden, 39; Earl of Buckinghamshire v. Drury, 2 Eden, 60; 3 Toml. P. C. 492, S. C.; 4 Br. Ch. Rep. 505, n. S. C. See Mr. J. Wilmot's argument in p. 177, of his Opinions and Judgments. The principle upon which this case was finally determined, was, that a jointure being *a provisione viri*, and not *ex contractu*, the consent of the intended wife is not a circumstance required by the statute to make it valid; and not being a *contract* for a provision, no argument can be drawn from the infant's incapacity to contract. This decision of the Lords has not been generally approved; Lord Thurlowe, as we are told by Lord Eldon, in Milner v. Lord Harewood, 18 Ves. 275, expressed himself strongly in favour of Lord Henley's opinion. But to bind the infant, the provision must be competent and certain, not one which she may never enjoy; Durnford v. Lane, 1 Br. Ch. Rep. 106; Williams v. Williams, Ibid. 152; Caruthers v. Caruthers, 4 Br. Ch. Rep. 500; Cannel v. Buckle, 2 P. Wms. 243; see also Harvey v. Ashley, 3 Atk. 613; Wilm. Op. 219, n. S. C.; Williams v. Chitty, 3 Ves. 545; Smith v. Smith, 5 Ves. 189; and the settlement must be made before marriage. Lucy v. Moore, 3 Br. P. C. 514; Seamer v. Bingham, 3 Atk. 56.

But by any articles entered into during her minority as to her real estate, an infant may refuse to be bound, and may abide by the interest the law casts upon her, which nothing but her own act after the period of majority can fetter or affect.

Clough v. Clough, 3 Wooddes. 453; 5 Ves. 717; Durnford v. Lane, 1 Br. Ch. Rep. 115; Milner v. Lord Harewood, 18 Ves. 275.‖

[It is otherwise with respect to her interest in a money portion, there she may be bound by an agreement before marriage: for if a parent or guardian cannot contract for the infant so as to bind this property, the husband, as it is a personal thing, would be entitled to it absolutely on the marriage.

Harvey v. Ashley, 3 Atk. 613.]

‖ It would seem too, that an infant cannot exercise a power over *real estate*, unless it be a power *simply* collateral; but as to personalty, clearly, he may exercise a power over that, at the age at which by law he may dispose of personalty to which he is absolutely entitled.

Sugd. Pow. 153; Hearle v. Greenbank, 3 Atk. 695; 1 Ves. 298, S. C. In the case of Hollingshead v. Hollingshead, cited in 1 Str. 604; 2 P. Wms. 229, and Gilb. Eq. Rep. 137, an infant tenant for life, with a power to jointure on his marriage, covenanted to settle lands on his wife, and afterwards died without having made any jointure, and equity made good the jointure; which, as the facts are stated, could be only on the principle that the infant had a disposing power. Sugd. *ubi supra*. But the master of the Rolls, Sir R. P. Arden, thought that the infant must have done some act after he came of age to confirm the jointure. 4 Br. Ch. Rep. 466. And in a case at the Rolls in 1738, the then master of the Rolls said, that the case of Hollingshead v. Hollingshead was an idle case, and not law. Colton v. Hoskins, Vin. Abr. tit. *Powers*, (A. 18, p. 3,) and see Lord Kilmurry v. Dr. Grey, cited in 2 P. Wms. 671, and explained in 3 Atk. 713. In the great case of Hearle v. Greenbank, *ubi supra*, both the counsel and the court said repeatedly, that there was no case in which it had been decided that an infant could execute a power appendant or in gross. See the forcible reasoning of Mr. Sugden on this point in his Treatise of Powers, 154, 155.‖

[It hath been determined, that where a male infant married an adult, who by settlement on the marriage covenanted that her estates should be settled to certain uses, he was bound by her covenant.

Slocombe v. Glubb, 2 Br. Ch. Rep. 545.] *β* When an infant marries a woman who is an adult, he is responsible for debts contracted by her *dum sola*. Roach v. Quick, 9 Wend. 238.*g*

If an infant submit to arbitration, he may execute or avoid it at his election, as he may all other his contracts.

13 H. 4, 12; 10 H. 6, 14; March, 111, 141; Roll. Abr. 730; Knight v. Stone, Sir W. Jones, 164; Noy, 93, S. C.; 2 M. & S. 209, S. C. cited by Dampier, J. [But an infant was holden bound by an award made upon a reference with the consent of his guardian. Bishop of Bath and Wells v. Hippersley, cited by Lord Hardwicke, 3 Atk. 614.—Indeed, wherever an infant, with the advice of his friends, enters into a contract, which appears to be beneficial to his interests, equity will support it. Therefore, where J S mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist upon but the rents of the mortgaged estate, and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest was made principal; upon which, the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant, who was then near of age, signed it; and the account was admitted to be fair; the lord chancellor held, that though, regularly, interest shall not carry interest, yet, that in some cases, in some circumstances, it would be injustice, if interest were not made principal; and the rather, in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. Earl of Chesterfield v. Lady Cromwell, 1 Eq. Ca. Abr. 287.]

Also, as to the acts of infants being void or voidable, there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it only, that the first is voidable, but the last absolutely void; as, if an infant deliver a horse or a sum of money with his own hands, this is only voidable, and to be recovered back in an action of account.

Perk. § 12, 19; Roll. Abr. 730; 2 Roll. Rep. 408; Latch. 10. β All contracts by infants which do not take effect by delivery, are void, but such as do, are voidable. Phillips v. Green, 3 Marsh. 9. γ

But, if an infant agrees to give a horse, and does not deliver the horse with his hand, and the donee takes the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void.

Perk. § 12, 19; Mod. 137. [The words of Perkins in the passage referred to are, "that all such gifts, grants, or deeds made by infants, as do not take effect by delivery of his hand, are void: but all gifts, grants, or deeds made by infants, by matter in deed or writing, as do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." Upon which Lord Mansfield observes, in 3 Burr. 1804, that the words "which do take effect," are an essential part of the definition, and exclude letters of attorney or deeds which delegate a mere power, and convey no interest; a power to receive seisin, is indeed an exception to this rule.]

β An infant is not liable to an action for a breach of promise of marriage. Hunt v. Peake, 5 Cowen, 475. See Willard v. Stone, 7 Cowen, 22. γ

In trespass *quare vi et armis insultum fecit, et totum crinem capitis ipsius Annæ abscidit*, the defendant as to all the trespass *præter tonsuram crinis* pleads not guilty, and as to that, pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money *licentiavit* the defendant *duas uncias crinis dictæ Annæ detondere et abscindere;* and upon the demurrer to this plea the court held, that the contract was absolutely void, and, consequently, the tonsure unlawful, and gave judgment accordingly for the plaintiff.

Mich. 26 Car. 2. Anna Secrogham *per* Guardianum v. Stuartson, 3 Keb. 369, S. C.

And as an infant is not bound by his contract to deliver a thing; so if one deliver goods to an infant upon a contract, &c., knowing him to be an infant, he shall not be chargeable in trover and conversion, or any other action for them; for the infant is not capable of any contract, but for necessaries; therefore, such delivery is a gift to the infant. But, if an infant without any contract wilfully takes away the goods of another, trover lies against him.

Also it is said, that if he take the goods under pretence that he is of full age, trover lies, because it is a wilful and fraudulent trespass.
Sid. 129; Lev. 169; Keb. 905, 913.

Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c., he make any contract or agreement with an intent afterwards to elude it, by reason of his privilege of infancy; that a court of equity will decree it good against him according to the circumstances of the fraud. But in what cases in particular a court of equity will thus exert itself, it is not easy to determine.(*a*)

Vide 2 Vern. 224; 2 Ves. 212; 3 Burr. 1802; 2 Eden, 73. (*a*) It can thus exert itself only where the act done by the infant is *voidable:* If it be absolutely void, as, in the case of a warrant of attorney given by an infant, it cannot make it good, though there appear circumstances of fraud on the part of the infant. Saunderson v. Marr, 1 H. Bl. 75.]

Also, notwithstanding the disability of an infant to contract, by the 7 Ann. c. 19, it is enacted, "That it shall and may be lawful to and for any person or persons under the age of twenty-one years by the direction of the high Court of Chancery, or the Court of Exchequer, signified by an order made upon hearing all parties concerned, on the petition (*b*) of the person (*c*) or persons for whom such infant or infants shall be seised or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians of such infant or infants, or person or persons entitled to the moneys secured by or upon any (*d*) lands, tenements, or hereditaments, whereof any infant or infants are or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner (*e*) as the said Court of Chancery, or the Court of Exchequer, shall by such order so to be obtained direct, to any other person or persons; and such conveyance, or assurance, so to be had and made as aforesaid, shall be as good and effectual in law to all intents and purposes whatsoever, as if the said infant or infants were, at the time of making such conveyance or assurance, of the full age of twenty-one years; any law," &c.

For the manner in which infant trustees are to convey the estates devolved on them pursuant to this act, vide Pr. Ch. 284. (*b*) || It cannot therefore be made on motion. Evelyn v. Forster, 8 Ves. 96. (*c*) Such person must have the absolute right in him: there must be no trust to be executed. *Ex parte* Anderson, 5 Ves. 240. (*d*) Estates abroad are within the act. *Ex parte* Professer, 2 Br. Ch. Rep. 325; Evelyn v. Forster, and *Ex parte* Anderson, *ubi supra.* (*e*) It may be by recovery; *Ex parte* Johnson, 3 Atk. 559; *Ex parte* Smith, Ambl. 624. In case of coverture, by fine, *Ex parte* Maire, 3 Atk. 479; Anon. Com. Rep. 615.||

And it is further enacted by the said statute, "That all and every such infant or infants, being only (*g*) trustee or trustees, mortgagee or mortgagees as aforesaid, shall and may be compellable, by such order so aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances as aforesaid, in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust-estate or mortgages."

(*g*) || The infant must be an express, clear trustee, and the trust in writing, and not constructive. *Ex parte* Vernon, 2 P. Wms. 259; Goodwin v. Lyster, 3 P. Wms. 387; Hawkins v. Obeen, 2 Ves. 559. But notwithstanding he be entitled to the mortgage money as co-executor and co-residuary legatee, he is within the act; for the receipt and discharge of the other executor leaves the infant a mere trustee. —— v. Handcock, 17 Ves. 383. The *necessary* costs incurred by the infant will be allowed him. *Ex parte* Cant, 10 Ves. 554.||

|| Where infants are entitled by descent or by surrender to the use of a will

to be admitted to any copyholds, the statute of 9 G. c. 29, provides that no forfeiture shall be incurred by reason of their not coming in to be admitted upon the usual proclamations; but that if they do not come in to be admitted in person, or by their guardians, or having no guardians, by their attorneys (whom the act empowers them for this purpose to appoint,) at one of the three then next courts, the lord or stewart, on due proclamations, &c., may appoint such guardians or attorneys for the purpose of admission.

By 29 G. 2, c. 31, infants interested in or entitled to leases, may by themselves, or their guardians, or any person on their behalf, apply to the Court of Chancery, the Court of Exchequer, &c., by petition or motion, in a summary way, and by the order and direction of such courts made upon hearing all parties concerned, may surrender such leases, and take in the name, and for the benefit, of such infants, new leases, for such number of lives, or for such term or terms of years, determinable upon such number of lives, or for such term or terms of years absolute, as mentioned in the leases so surrendered, at the making thereof respectively, or otherwise as the said court shall direct; the new leases to be to the same uses, and liable to the same trusts with those in the former leases.‖

4. *Where voidable, as to the Infant, shall yet bind others.*

It is laid down as a general rule, that infancy is a personal privilege, of which no one can take advantage but the infant himself, and that therefore, though the contract of the infant be voidable, that yet it shall bind the person of full age; for being an indulgence which the law allows infants to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment.

1 Show. 171; 3 Mod. 248. *β* Parker v. Barker, 1 Clarke, 136; Lesler v. Frazer, Ril. Ch. C. 76; S. C.; 2 Hill's Ch. 541; Beeler v. Bullitt, 3 A. K. Marsh. 281.*g*

Therefore it hath been adjudged, that if an infant let a house to J S, reserving rent, and the rent be in arrear, the infant may distrain for the rent, or bring an action of debt; though it was objected, that, in the institution, the contract was not reciprocal.

1 Sid. 446; 1 Mod. 25.

Again, an infant brought an action on the case by her guardian, and set forth, that she gave the defendant 10*l*., and put herself to be her servant for seven years, and that, in consideration thereof, the defendant promised to find her with all necessaries, save only apparel, and likewise promised to teach her to sing and to dance; and that the defendant within the time turned her out of the house, and did not teach her to sing and dance; whereupon there was judgment by default, and a writ of inquiry of damages: it was moved to stay the filing of the writ of inquiry, because here was no consideration, the agreement not being reciprocal: but the court held, that, though the contract might be void as to the infant, yet it bound her mistress, who was of full age; and therefore ordered the writ of inquiry to be filed.

Farneham v. Atkins, 1 Sid. 446; 2 Keb. 623, S. C.

Again, an infant brought an *assumpsit* by his guardian, and declared, that whereas the defendant entered into his close, and cut his grass, that

in consideration he would permit him to make it hay, and carry it away, he promised to give him six pounds for it: upon this declaration the defendant demurred, supposing it to be no consideration; for the infant was not bound by his permission, but might sue him notwithstanding; but the court gave judgment for the plaintiff.

1 Vent. 51; 1 Mod. 25; 3 Keb. 581, S. C., Smith v. Bowen. See the authorities above.

So, on a promise to pay the plaintiff, an infant, the value of such land, in consideration the plaintiff would suffer the defendant to enjoy the said land after the death of A, to the time of his full age, the plaintiff had judgment, though he was not bound by the contract.

2 Sid. 109, Davis v. Mannington.

So, on a promise to an infant to do such an act, in consideration that the infant promised to pay such a sum, in *assumpsit* by the infant, he had judgment, though the money was not paid; for the court held, that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made.

Sid. 41; Keb. 1, S. C., Forrester's case.

So, if a man of full age and a female of fifteen promise to intermarry, and after request by her, he marries another woman, an action on the case lies against him for the violation of the contract; for though objected that this was *nudum pactum*, and not reciprocal, as the man could not compel her, being an infant, to perform her promise, yet being voidable only as to herself, as she finds it for her benefit, it shall bind him, being of full age.

Trin. 5 G. 2, Holt v. Ward, adjudged, 2 Stra. 937; 1 Barnardist. K. B. 290; Fitzgib. 175, 275; 3 Atk. 306. β A promise by an infant to marry, being in its nature beneficial, is not void, but voidable. It is binding on the adult. Cannon v. Alsbury, 1 Marsh. Kty. R. 76; 2 M. & S. 205. But, in New York, an infant cannot disagree until he arrive of age. Roof v. Stafford, 7 Cowen, 179.*g* || So, Warwick v. Bruce, 2 M. & S. 205, affirmed in the Exchequer Chamber, 6 Taunt. 118. In this case Lord Ellenborough relied much upon the consideration being in part executed by the infant, a circumstance, which was supposed to have weighed with the court in the cases of Farneham v. Atkins, and Smith v. Bowen, and Forrester's case, *supra;* but Dampier, J., observed, that the question does not so much depend upon whether the consideration is executed, as in what manner the interests of the infant will be affected by the contract.||

If an infant lose money at play, which the winner takes, such taking is a conversion, and trover and conversion lies for the infant for the sum so received. But, if the infant had won, he might have retained the money, and no action would have lain against him for it.

Cited in the case of Holt and Ward to have been so held by Holt, C. J., Hil. 3 Annæ, in B. R. in the case of Barker and Medlicot; but the action there brought was an *indebitatus assumpsit*, and for that cause the plaintiff was nonsuited, because the foundation of the action was a tort, and the action brought founded in contract. Fitzg. 279.

[Upon a bill for a partition between an adult and an infant, as the latter cannot convey till he comes of age, the court will therefore respite the conveyances on the part of the adult; and this, it seems, whether the infant be plaintiff or defendant.

Lord Brook v. Lord and Lady Hertford, 2 P. Wms. 518; Tuckfield v. Buller, Ambl. 197.]

|| Where an adult is in partnership with an infant, and in that relation they enter into a contract with a third person, the adult shall not be permitted to avoid the contract he has so entered into, by saying his partner is an infant, and incompetent to make a contract; but in such case, the plaintiff may overlook the privity of the infant, as to whom the contract

is nugatory, and may describe it as a contract made by the adult contractor only. If he declares against them both on the joint contract, and the minor pleads his infancy, the plaintiff cannot enter a *nolle prosequi* as to him, and proceed in that action against the other defendant; but should commence a new action against the adult only.

Chandler v. Parkes, 3 Esp. 76; Burgess v. Merill, 4 Taunt. 468; Gibbs v. Merrill, 3 Taunt. 307.

If an infant joins with an adult in the grant of an annuity, though the contract on his part is declared absolutely void by stat. 17 G. 3, c. 26, § 6; yet the several covenant of the adult is not avoided by it.

Haw v. Ogle, 4 Taunt. 10.

If an apprentice, on coming of age, avoid his indentures, as he may do, this shall not discharge the covenant of his father for his services during the whole term of apprenticeship.

Cuming v. Hill, 3 Barn. & A. 59; and see Ibid. 584.‖

5. *At what Time voidable Acts are to be avoided.*

Here we must observe a diversity between matters of record done or suffered by an infant, and matters *in fait;* that he may avoid matters *in fait*, either within age, or at full age; but matters of record, as statutes merchant and of the staple, recognisances acknowledged by him, or a fine levied by him, recovery against him by default in a real action, (saving in dower,) must be avoided, viz., the statute, &c., by *audita querela*, and the fine and recovery during his minority; for being judicial acts, taken by a court or judge, the nonage of the party to avoid the same shall be tried by inspection, and not by the country.

Co. Lit. 380; 2 Inst. 483; Godb. 149; Winch. 114; Yelv. 155; 12 Co. 121; 3 Mod. 229. β An infant may avoid a deed of bargain and sale during his minority, or after his arrival at full age. Phillips v. Green, 3 Marsh. 13.*g*

And as an infant cannot avoid a recognisance, &c., but during his minority, so if he enters into a recognisance, &c., and brings an *audita querela* to reverse it, and the judges, upon inspection, find him within age, and therefore adjudge the recognisance void, and discharge the infant; but the conusee after reverses the judgment in the *audita querela* for error; the infant, after his full age, shall have no new *audita querela* to vacate the recognisance, though it once appeared to the judges that he was within age when he entered into the contract. And the reason hereof is, because the infant in no case after his full age can set aside the recognisance or statute; for, 1st, The writ in the register runs *quod conusor adtunc et adhuc infra ætatem existit*, and therefore cannot have it at full age without altering the form of the writ. 2dly, When the judgment of the *audita querela* is reversed by a writ of error, it is entirely set aside, and in all respects useless as if it had never been given, and, consequently, can obtain no credit, should the conusor produce the record. 3dly, When the conusor is of full age, there will be no averment admitted against the recognisance, &c., which is an act of record; and it is presumed by the record that the conusor was of full age, since the judge, or other officer that took the recognisance, &c., suffered him to enter into them.

And. 25, 228; N. Bendl. 80; Dyer, 232; Moore, 75, 460; 2 And. 158; 10 Co. 43 a; Noy, 16; Yelv. 88; Reg. 149, 150; 2 Bulst. 320; F. N. B. 105.

But, if an infant bargain and sell lands by deed indented and enrolled, he may avoid it at any time,

2 Inst. 673.

Also, it is said that if an infant appear by attorney, and suffer a recovery, it may for this error be reversed after the infant comes of age, because it shall be tried by the country whether the warrant of attorney was made when under age or not.

1 Sid. 321; 1 Lev. 142; 5 Mod. 209.

β When a judgment is rendered against several defendants, one of whom is an infant, a writ of error may be brought by *all* at any time before the expiration of a year after the infant shall have come of age, although it may be more than one year after the rendition of the judgment.

Priest v. Hamilton, 2 Tyl. 44.

A deed of land cannot be avoided by an infant until he shall have attained his full age, though he may enter in the mean time.

Bool v. Mix, 17 Wend. 119.*g*

6. *By whom to be avoided.*

It seems agreed as a general rule, that none but the infant himself, or his representatives, privies in blood, can avoid (*a*) a conveyance made by the infant during his nonage.

8 Co. 42 b; 2 Inst. 483; Roll. Rep. 401. β The executor or administrator of an infant may avoid the infant's contract by pleading his infancy. Smith v. Mayor, 9 Mass. 62; Martin v. Mayo, 10 Mass. 137; Jackson v. Mayo, 11 Mass. 147; Hulsey v. Jewett, 9 Mass. 100.*g* (*a*) This must be understood such a conveyance as is, in its own nature, voidable by the infant, &c., such as a feoffment, &c., and not absolutely void, as a surrender, grant, release, which being void *ab initio*, are so to all men, and all persons may take advantage of them. Carth. 436; 3 Mod. 301, &c. β The privilege of avoiding his voidable acts or contracts, is personal to the infant. United States v. Bainbridge, 1 Mason's R. 78; Van Bramer v. Cooper, 2 Johns. 279; Hartness v. Thompson, 5 Johns. 160.*g*

As, if an infant seised in fee make a feoffment, and die, his heir shall enter.

8 Co. 42 b.

So, if seised in tail-male, he make a feoffment, and (*b*) die, his son being heir general and special may enter.

8 Co. 43 a. (*b*) So, though attainted of felony. 8 Co. 43 a.——But by Co. Lit. 337 a, it is otherwise in such case, because his entry is not lawful in respect of his estate only, but of his blood also, which is corrupted.

And if he have no sons, but only daughters, his brother, being his special heir *per formam doni* made to his father, may avoid the feoffment, because he is privy in blood, and has the land only by descent.

8 Co. 43.

But privies in estate cannot avoid (*c*) a conveyance made by an infant.

8 Co 43 a. (*c*) But, if tenant in tail within age come in as a vouchee by attorney in a common recovery, he in remainder may assign this for error; for he is party in interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it, by taking advantage of any error in it. But for this vide Roll. Abr. 755, Bridg. 75; Roll. Rep. 301; Cro. Eliz. 739; Palm. 123; Allen, 75.

As, if tenant in tail, being within age, make a feoffment, and die without issue, the donor shall not enter, because he was privy only in estate, and no right accrued to him by the death of the donee.

8 Co. 43. But in Palm. 254, this case is cited, and denied by Doddridge, Justice, to be law, who said, the feoffment by an infant could not put him to his *formedon* by a discontinuance, and then if he could not enter, he would be without remedy.

So, if there be two joint-tenants within age, and one of them make a

feoffment in fee of his moiety, and die, the survivor cannot enter; for by the feoffment the jointure was severed, so long as the feoffment continued in force, and therefore the heir of the feoffor may have a *dum fuit infra ætatem*, or enter into the moiety.

8 Co. 43 a; Co. Lit. 337, S. P.

But, if both had joined in the feoffment, and one had died, the right had survived to the other, and he should have had the land from the first feoffor.

2 Co. 43 a.

If a man within age, seised in right of his wife, make a feoffment, and die, his heir cannot enter, because no right descends to him; but, inasmuch as the baron, if he had lived, might have entered in the right of his wife only, and not in respect of any right which he himself had, the wife (even before the 32 H. 8, c. 28,) might in such case have entered in her own right.

Co. 43 b; Lit. § 633.

But, if the feme, being only tenant in tail, and the baron within age, had made a gift in tail to another, by which the baron gained a new reversion in fee, and died, the wife might enter, or the heir of the baron who had a new reversion descended to him; but, if the heir had entered, and defeated the tail given by the infant, his estate vanished, and by operation of law, the feme was immediately seised of her whole estate.

8 Co. 43 b; Co. Lit. 337 a.

Privies in law, as the lord by escheat, shall not avoid a conveyance made by an infant.

8 Co. 44 a.

As, if an infant make a feoffment, and die without heir, the lord shall not avoid it. But because that in this case it appeared the feoffment was executed by letter of attorney made by the infant, it was resolved to be void, and that the land should escheat to the queen.

8 Co. 42, 45, Whittingham's case; Dyer, 10 b: 2 Roll. Abr. 2; 3 Mod. 306.

7. *In what Manner they are to be avoided.*

As to fines and recoveries, they being, as hath been already observed, matters of record, are regularly to be avoided by writ of error, which must be brought during the infant's minority, that the court may inspect the infant, and so vacate the contract with the same solemnity that it was entered into.

Co. Lit. 380; 2 Inst. 483. β The act of an infant by matter of record, must be avoided by some act of record, as by writ of error or by *audita querela* during his minority. But when the act of the infant is a matter *in pais*, it may be avoided by an act *in pais*. Lessee of Tucker v. Moreland, 10 Pet. 59.*g*

Therefore, if an infant suffer a common recovery, in which he comes in as vouchee in his proper person, and not by guardian, though this shall not bind him, but that he may in a writ of error avoid it, because it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reversed it by a writ of error; for judgments are not to be subverted by matter *in pais* without matter of record.

Roll. Abr. 742; Styl. 246.

If a feme covert, being under age, levies a fine, which she is afterwards willing to reverse, she may be brought into court by *habeas corpus*, that she may be inspected. And, it seems, the fine may be set aside on

motion; for the husband may not be willing, nor permit her to bring or proceed in a writ of error.

2 Vent. 30; Mod. 246; 3 Lev. 36, and vide tit. *Fines and Recoveries.* βWhen a *feme covert*, an infant, executes and acknowledges a deed in the form prescribed by the statute, she may still avoid it on coming of age. Bool v. Mix, 17 Wend. 119; Phillips v. Green, 3 Marsh. Kty. R. 10; S. C. 5 Monroe, 350.*g*

Also it hath been holden, that if a feme covert, being an infant, is about to levy a fine, her relations may enter a *caveat*, and that then the court will set aside all proceedings after such entry, but that if they suffer the fine to pass, they cannot by any means reverse it after the infant's death. But it seems that the fine being taken by virtue of a *dedimus potestatem*, and the commissioners knowing the party to be an infant, may be (*a*) fined at the discretion of the court, as they were in this case, the one 300*l.* and the other 200*l.*

Pash. 30 Car. 2, Rawlinson v. Owens. (*a*) Where the court ordered informations to be filed against commissioners who took a fine from an infant. 3 Lev. 36. But for this vide 12 Co. 124; 2 Roll. Rep. 113; Cro. Eliz. 531.

As infants, at their peril, are obliged to avoid fines and recoveries by writ of error, during their minority, so must they avoid recognisances and statutes entered into by them; and this by (*b*) *audita querela* during their minority likewise, that the courts may have the like opportunity of determining by inspection as to their nonage; for being matters of record, they must, according to the rule, be dissolved *eo ligamine quo ligantur.*

Dyer, 232; Reg. 149; Moore, 75; F. N. B. 105; 2 Inst. 673; 10 Co. 43; Noy, 16; Cro. Ja. 5; 2 Roll. Abr. 57; 2 Bulst. 320; 3 Mod. 229. (*b*) An infant may bring an *audita querela* to avoid a statute for his nonage, although it be not certified or returned in any court. And. 228.—And there said, that the common practice was so, else the conusor might be of age before the conusee could procure it to be certified; and vide 3 Bulst. 307.

If A, being within age, becomes bail for B, and after two *sci. fa.* and *nihil* returned, judgment is given against A, &c., he may have an *audita querela* and avoid the recognisance, and so the judgment thereupon, of consequence, shall be avoided.

Yelv. 155; Cro. Ja. 646, S. P., and vide Co. Ent. 87, 88.——Where an infant was bail, and taken in execution, and he brought an *audita querela*, and moved to be inspected; the court, as a matter discretionary, refused to admit him to bail till he corroborated his allegation by the oaths of witnesses; which he having done, and the copy of the register where he was born being produced, he was discharged; but, if he had brought his *audita querela* before he was taken in execution, he must have had a *supersedeas* of course. Carth. 278, and vide *supra*, letter (D).

But, if A, being within age, enters into bond to B, who procures C, without any warrant to appear for A; and upon *non sum informatus* entered, and judgment by default, A is taken in execution; he shall not have an *audita querela*, but he must take his remedy by action of deceit against the attorney.

Cro. Ja. 694. But for this vide tit. *Attorney.*

If an infant makes a feoffment, he may enter (*c*) either within age, or at full age; and if he dies, his heir may enter, or have a *dum fuit infra ætatem.*

Co. Lit. 247 b, 248 a. βSee Bool v. Mix, 17 Wend. 119.*g* (*c*) But, though the infant may avoid his feoffment by entry during his nonage, yet he cannot have a *dum fuit infra ætatem* till he comes to his full age; for he is allowed to enter, that he may save to himself the profits in the mean time; but such entry, being the act of an infant, seems to be as voidable at full age as his feoffment. But, if he was to recover in a writ of *dum fuit infra ætatem*, it would for ever bind him, and therefore it can only be brought when he comes of full age. F. N. B. 192. See *antè.*

If husband and wife are both within age, and they by indenture join in a feoffment, and the husband dies, the wife may enter, or have a *dum fuit infra ætatem.*

Co. Lit. 337 a; F. N. B. 192.

But,(*a*) if she was of full age, she shall not have a *dum fuit infra ætatem* for the nonage of her husband, though they be but one person in law.

Co. Lit. 337 a. (*a*) *Quære*, if she was within age, and the baron of full age. F. N. B. 192.

If two joint-tenants, being within age, make a feoffment, though they may join in a writ of right, yet they cannot in a *dum fuit infra ætatem;* for the nonage of one is not the nonage of the other.

Co. Lit. 337 a; F. N. B. 192, S. P.

If an infant surrenders a copyhold estate, and dies, his heir may enter without being put to his writ of *dum fuit infra ætatem;* for such surrender was but (*b*) a conveyance by matter *in pais*, which cannot bind an infant, but that he or his heirs may enter, or bring trespass.

Cro. Eliz. 90; Leon. 95, adjudged. (*b*) Surrenders, grants, releases, &c., which are said to be void *ab initio*, may be avoided by entry, assize, &c., at any time. Cro. Car. 103; 2 Roll. Abr. 728; Show. P. C. 153; Carth. 436.—But a feoffment by an infant with livery cannot be avoided by assize without entry. Bro. *Disseisin*, 63.——*Secùs* if the livery was by letter of attorney. Bro. *Disseisin*, 63.

If an infant make a lease for years, though he reserve no rent thereon, he cannot plead *non est factum*, but must avoid it by pleading the special matter of his infancy.

Bro. tit. *Leases*, 50; Cro. Eliz. 857; 10 Co. 43; 5 Co. 119; 2 Inst. 483; Moore, pl. 132; Poph. 178.

So, if an infant enter into an obligation, which takes effect by sealing and delivery, and, consequently, is (*c*) a deliberate act, he can only avoid it by pleading the special matter of his infancy.

Salk. 279, *per* Treby, C. J. (*c*) The deeds of infants have the form, though not the operation of deeds; so that *non est factum* cannot be pleaded thereto, without showing some special matter to make them of no efficacy. 3 Mod. 310, *per Cur.* [But the reason that infancy must be pleaded specially to avoid the deed, is, not because it has the *form* of a deed, but because it has an operation from the *delivery*. *Per* Lord Mansfield, 3 Bur. 1805; 3 Taunt. 307.]

But in *assumpsit* against an infant, he may give infancy in evidence, and need not plead it; for the promise of an infant is absolutely void.(*d*)

2 Lev. 144; Salk. 279; Gilb. Hist. C. P. 64. (*d*) ‖ It is not void until the infant says that it is void. He may confirm it when he comes of age; but he could not confirm a nullity.‖ β When the infant rescinds the contract on the ground of infancy, he is not entitled to recover any compensation for labour he may have performed under it. Weeks v. Leighton, 5 N. H. Rep. 343. See Hearney v. Owen, 4 Blackf. 337.*g*

If the heir within age assign to the wife more land in dower than she ought to have, he himself shall have a writ of admeasurement of dower at (*e*) full age, by the common law. So, if too much be assigned in dower by the heir within age, or his guardian in chivalry, and the heir die, his heir shall have such writ to rectify the assignment. But the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues, and if any wrong be done, it is to the guardian himself, and not to the heir.

F. N. B. 148; Co. Lit. 39 a; 2 Inst. 367. (*e*) *Quære*, if not within age.

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of admeasurement of dower

by the stat. of W. 2, c. 7, before which statute the guardian had no remedy; because the writ of admeasurement being a real action lay not for the guardian, who had but a chattel. Also, by the same statute it is provided, that if the guardian pursue such writ faintly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the faint pleading or collusion generally.

2 Inst. 367.

8. *Of the Confirmation of voidable Acts.*

The privilege the law allows infants being entirely calculated for their benefit, hence at their full age they are allowed to ratify and confirm their contracts, or to rescind and break through them, as it shall seem most for their advantage; and therefore the purchase of an infant is only voidable, and vests the freehold in him till he disagrees thereto; and his continuing in possession after he comes of age is a tacit consent and confirmation thereof, since it is to turn to his advantage.

Co. Lit. 3 a; 2 Vent. 203. β An infant who bought real estate and gave his mortgage to secure the purchase-money, cannot, after he becomes of age, affirm the sale and avoid the mortgage. Bigelow v. Kinney, 3 Verm. 353; Dana v. Coombs, 6 Greenl. 89. *g*

β A voidable contract of an infant may be ratified after he comes of age, by his positive acts in favour of the contract; or by his tacit assent under circumstances not to excuse his silence.

Lawson v. Lovejoy, 8 Greenl. 405, S. P.; Cheshire v. Barrett, 4 M'Cord, 241.

But a simple declaration or acknowledgment after his coming of age, is not sufficient. It must be accompanied by some act which necessarily recognises the legal existence and binding efficacy of the obligation.

Ordinary v. Wherry, 1 Bailey, 28. *g*

If an infant takes a lease for years of land, rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land; this makes the lease good and unavoidable, and, by consequence, makes him chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority; yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made.

Kelsey's case, Cro. Ja. 320; 2 Bulstr. 69; Roll. Abr. 731, S. C. by the name of Kettle and Elliot, adjudged; Brownl. 120, S. C. adjudged; 2 Bulstr. 69, S. C., adjudged against the infant, but no notice taken of his having attained his full age.

But it is said, that if an infant possessed of a term for years sells it for money, and after he comes of full age receives part of the money for it, he shall avoid the grant notwithstanding: for the contract being void in the commencement, it cannot be made good by any subsequent act.*

Dals. 64, *per Curiam.* **Sed qu.* if this is not an affirmance of the contract? vide *infra.*

Yet it hath been ruled in Chancery, that if an infant makes an agreement, and receives interest under it after he comes of full age, such agreement shall be decreed against him.

Vern. 132. ‖Lord Henley calls this a paltry note of the reporter's. 2 Eden, 58.‖

So, if an infant make an exchange of lands, and continues in possession after he comes of age, he shall be bound by it.

2 Vern. 225, *per Curiam.*

Also, where an infant desired the lands subject to a trust for payment of

younger children's portions might not be sold, and offered by his answer to settle other lands for raising the portions, it was holden, that he should be bound by the offer made by him in his answer, if the other side were thereby delayed, and if the infant did not immediately after his coming of age apply to the court, in order to retract his offer, and amend his answer. 2 Vern. 224.

An infant made a lease for years, and at full age said to the lessee, *God give you joy of it;* this was holden by Mead a good affirmation of the lease; for this is a usual compliment to express one's assent and approbation of what is done.

4 Leon. 4. βAn infant having given his note, on being asked for payment, said, "I will pay it as soon as I can make it, but I cannot do it this year; I understand the holder is about to sue it, but she had better not." Held, a confirmation of the contract, and that an action could be brought at once. Bobo v. Hansell, 2 Bailey, 149.*g*

[A mother, as guardian to her children, who were all infants, granted a building lease of a part of their estate for forty-one years; her eldest son, who was about nineteen years of age, joined with her in making the lease, and covenanted that the lessee should have quiet enjoyment, and that the rest of the children, when of age, should confirm the lease: the children all arrived at age, and accepted the rent under this lease for above ten years after the youngest came of age: after such acceptance they brought their ejectment against the lessee, who thereupon filed his bill in the Court of Chancery to have the lease established, which Lord Hardwicke decreed, principally upon the ground of the acceptance of the rent for so long a time; and as it was against conscience to bring the ejectment, he ordered that the plaintiff should have costs at law and in equity.

Smith v. Low, 1 Atk. 489. In this case Lord Hardwicke said, that, in a court of equity, a woman is bound by a marriage-contract made during her minority, if she accepts pin-money, or a jointure under it. 1 Atk. 490.]

If an infant enters into an obligation for payment of money, and the obligee, when he comes of age, threatens to sue him, and the infant being of full age promises, in consideration of forbearance, that he will pay him, this promise is good, and shall bind him, though he might have avoided the obligation by plea.

3 Leon. 164; 4 Leon. 5; Godb. 158; Leon. 114, N. Dyer, 272; Cro. Eliz. 127. But Cro. Eliz. 700; S. P. *cont.* by Fenner *cont.* Clinch, and Roll. Abr. 18, S. P., *cont.*, and vide Poph. 178, Latch, 21; Owen, 74; Vide *etiam contr.* Capper v. Davenant, Tr. 29 Car. 2 B. R.; Bull. Ni. Pr. 153. βWhen infancy is pleaded, a new promise made after the suit is commenced is not sufficient to sustain a pending action. Hale v. Gerrish, 8 N. H. Rep. 374; Thing v. Libbey, 4 Shep. 55; Ford v. Phillips, 1 Pick. 203. But see Wright v. Steele, 2 N. H. Rep. 51.*g* ‖3 Keb. 798, S. C. by the name of Tapper v. Davenant. In this case the bond had been given by the infant during his minority for the amount of a debt, not for necessaries; and the court said, that the specialty had so extinguished the simple contract debt, as not to leave a sufficient consideration to found an express promise after full age, and, consequently, an *assumpsit* upon the original cause of action could not be maintained.‖

Also, it is said to have been ruled, where the defendant under age borrowed money of the plaintiff, and afterward at full age promised to pay it him, that this is a good consideration for the promise, and the defendant shall be charged.(*a*)

Comb. 381, *per* Holt, at the sittings in Guildhall. (*a*) [So, if goods, not necessaries, be delivered to an infant, and after he comes of age he ratify the contract by a promise to pay, he is bound. Southerton v. Willock, 2 Str. 690, *per* Holt, C. J., in Hylling v. Hastings, 1 Ld. Raym. 389, S. P. *per* Ashhurst, J., in Cockshott v. Bennet, 2 T. R. 648, and if in an action in such case the defendant deny the ratification of the contract

after his age of majority, the proof of infancy lies upon him. Borthwick v. Carruthers, 1 T. R. 648. However, if the original transaction be not perfectly fair, and the infant be entrapped into a ratification of it immediately upon his coming of age, equity will give relief. Brooke v. Gally, 2 Atk. 34.]

Also, it is said to have been decreed in Chancery, that if an infant borrows a sum of money, for which he gives a bond, and devises his personal estate (being of sufficient capacity) for the payment of his debts, particularly those he had set his hand to, this bond-debt shall be paid. Abr. Eq. 282.

β An infant may confirm a contract by his acts, when they are unequivocal, as well as by his express agreement.

Eubanks v. Peak, 2 Bailey, 497; Lawson v. Lovejoy, 8 Greenl. 405; Ordinary v. Wherry, 1 Bailey, 28; Delano v. Blake, 11 Wend. 85; Wheaton v. East, 5 Yerg. 41; Deason v. Boyd, 1 Dana, 45; Rogers v. Hurd, 4 Day, 57; Cline v. Beebe, 6 Conn. 494; Benham v. Bishop, 9 Conn. 330; Alexander v. Heriot, 1 Bail. Eq. 223; Curren v. Patton, 11 S. & R. 305; Hubbard v. Cummings, 1 Greenl. 11; Martin v. Mayo, 10 Mass. 140; Boston Bank v. Chamberlin, 15 Mass. 220; Whitney v. Dutch, 14 Mass. 457; Smith v. Mayo, 11 Mass. 147; Van Dorens v. Everett, 2 South. 460; Thompson v. Linscott, 2 Greenl. 186; Lessee of Tucker v. Moreland, 10 Pet. 59; Everson v. Carpenter, 17 Wend. 419; Delano v. Blake, 11 Wend. 85; Goodsell v. Myers, 3 Wend. 479; Millard v. Hewlett, 19 Wend. 301; Houser v. Reynolds, 1 Hayw. 143; Alexander v. Hutcheson, 2 Hawks, 535; Breckenridge's heirs v. Ormsby, 1 J. J. Marsh. 244; Smith v. Mayo, 9 Mass. 62; Hulsey v. Jewitt, 9 Mass. 100; Barnaby v. Barnaby, 1 Pick. 223; Hartley v. Wharton, 3 Perr. & Dav. 529.

But the mere recognition of a contract, is not, *per se*, proof of the confirmation of it.

10 Pet. 59; Brayton v. Burchein, 14 Johns. 124; Alexander v. Hutcheson, 2 Hawks, 535; Whitney v. Dutch, 14 Mass. 460; 1 Pick. 203; 1 Pick. 223.

The ratification of a contract made by an infant, and an acknowledgment of a debt barred by the act of limitations, stand on different grounds, and are governed by different principles. In the former case, there was not originally any legal right capable of being enforced, and a new liability is assumed; in the latter, the debt continues from the time it was contracted, and the acknowledgment merely rebuts the presumption created by the statute. To constitute a ratification of the infant's contract, there must therefore be an express promise to pay the debt after the infant arrives at full age; while a bare acknowledgment of the debt is sufficient to take the case out of the statute of limitations. In an action on a promissory note, the defendant pleaded infancy, the plaintiff replied that the defendant ratified the contract after he became of full age. Evidence was given that after the defendant became of age, on the note being presented to him, for the purpose of having it settled, the defendant took it and said he would immediately write to the plaintiff about it; and afterwards, in answer to an inquiry made by the plaintiff in a letter to the defendant, whether he considered the plaintiff's claim worthy of his attention, he replied in a letter to the plaintiff, "I do consider your claim as worthy of my attention, but as not meriting my first attention," and then went on to say that his business was in an unsettled state, but that as soon as he could bring it to a close, he would give to the plaintiff's claim the attention due to it; it was held that this evidence did not show a ratification.

Wilcox v. Roath, 12 Conn. 550. See Hale v. Gerrish, 8 N. H. Rep. 374.

When a man was married to an infant under twelve years of age, who immediately declared her ignorance of the duties of marriage and her dissent from it; on a bill filled by her next friend, the court ordered her

to be placed under its protection as a ward of the court, and forbade all intercourse or correspondence by the defendant on pain of contempt.

Ayman v. Roff, 3 Johns. C. R. 49.

When on coming of age, a party claims restoration of property parted with while he was an infant, he must, on his part, restore what he has received; asking for equity, he must do equity.

Hillyer v. Bennett, 3 Edw. 222; Fontelet v. Murrell, 9 Lo. Rep. 305.*g*

(K) Of the Privileges of Infants in Suits and Actions by and against them; And herein,

1. *How far the Courts take care of the Interest of Infants.*

INFANTS have divers judicial privileges, which persons of full age have not; as, if judgment be given against an infant by (*a*) default, after the default he shall have a writ of error, and reverse the judgment for his nonage. But, if an infant after appearance make default, judgment shall be given against him.

Cro. Ja. 464, *per* Houghton, Justice, in the case of Holtford and Platt, which vide, and Hob. 266; 2 Roll. Rep. 14, 22, S. C. (*a*) This must be understood of an hereditary right, in which the infant shall not lose by default; but there is a difference betwixt those things which concern the hereditary right, for which the parol shall demur, and those actions which are brought and grounded on *son tort demesne*, as in waste, disseisin, or the like; for in these the infant shall not be privileged, *quia malitia supplet ætatem*. Cro. Ja. 467, *per* Croke, Justice.

In an assize against two, of which one is an infant, if they make default by which the assize is awarded, and after the assize remains for default of jurors, yet the infant shall be received to plead afterwards.

29 Ass. 36; Roll. Abr. 731, S. C.

In an assize by an infant, if the tenant pleads an ill bar, and the infant replies, by which he makes the bar good, if the plaintiff had been of full age; yet this shall not make the bar good against the infant; but, if the judgment be for the tenant thereupon, this is error; for the court ought to (*b*) plead for the infant, for the tenderness of his age.

37 Ass. 5 Roll. Abr. 731, S. C. (*b*) In case of an infant, the judges ought to be his counsellors. Cro. Ja. 466. ‖ On a petition therefore on the part of an infant, the Court of Chancery will do what is for the benefit of the infant, without regard to the prayer. 10 Ves. 59.‖

In debt against an infant for rent arrear, the defendant demurred to the declaration, and afterwards pleaded to issue, and the court held that the infant may waive his demurrer in the same term, but not in a subsequent one.*

2 Bulst. 69. **Sed qu.* if the court would not on motion give leave, in the second term, to waive the demurrer?

If in a *formedon* in remainder the tenant pleads infancy, and that the remainder descended to him, and prays his age, and the demandant pleads that the remainder did not descend to him, and thereupon issue is joined, and found for the demandant, a final judgment shall be given, notwithstanding the infancy of the tenant; for in all cases where the issue is upon a dilatory plea, and tried *per pais*, the judgment is peremptory.

Lev. 163; Sid. 118, 252, Amcot and Amcot, adjudged.

An infant shall be privileged from fine and imprisonment in those cases in which persons of full age shall be thus punished; as, if an infant in an assize vouch a record, and fail at the day, he shall not be imprisoned.

although the statute of Westm. 2, c. 25, that gives imprisonment in such a case is general. Also, if guilty of a forcible entry, though he may be fined for the same, yet he cannot be imprisoned. So, if an infant be convict in an action of trespass *vi et armis*, the entry must be *nihil de fine, sed pardonatur quia infans.**

Hal. Hist. P. C. 20, 21; Co. Lit. 357; Bridg. 175; Cro. Ja. 274. *The *capiatur pro fine* is taken away by 5 W. & M. c. 12.

An infant being plaintiff or demandant shall not be amerced; and this is the reason (*a*) he shall not find pledges.

Co. Lit. 127; 8 Co. 61; 3 Bulst. 276; Palm. 518; Roll. Abr. 214, 288. (*a*) That he shall not find pledges. Cro. Car. 161, adjudged.

But an infant defendant shall be amerced if he pleads with the demandant, and the matter is found against him; (*b*) but he shall be pardoned of course.

Roll. Abr. 214; Cro. Car. 410. (*b*) And the entry in such case is *ideo in misericordia, sed pardonatur quia infans.* 8 Co. 61; Palm. 518. *Nihil in misericordia quia infans.* Cro. Car. 410. See the note, *supra.*

But, if an infant brings an action by his *prochein ami*, and pending the action comes of full age, and makes an attorney, and after is nonsuit, he shall be amerced.

Dyer, 338, pl. 41.

If an infant brings an action of trespass by guardian against two, and the defendants plead not guilty, and at the *nisi prius* the plaintiff appears in person, and a verdict is found for the plaintiff for part, and not guilty for the rest, and one of the defendants is found not guilty, and judgment is given for the plaintiff for that for which the verdict is given for him, *et quod nil capiat per billam* for the rest, *sed nihil de misericordia pro falso clamore, &c., quia querens tempore transgressionis prædict. fact. intra ætatem existebat*, yet this is good, and no error.

Roll. Abr. 214, Methwold and Anguish, adjudged.

If a *præcipe* be brought against an infant, and pending the plea he comes of full age, he shall be amerced for the delay after he comes of full age.

5 Co. 49; Moore, 394; Roll. Rep. 294.

If an infant by his guardian or *prochein ami* brings an ejectment which is found against him, and the guardian, &c., becomes insolvent, the infant himself must answer the costs; because the rule was entered into for the infant's benefit; and infants must not disturb the possession of others by unlawful entries, without being punished with costs.

3 Buls. 151. Vide tit. *Ejectment.*

|| If an infant be arrested, the court will not discharge him upon common bail on the ground of his infancy.

Madox v. Eden, 1 Bos. & Pul. 480.||

The interest of infants is so far regarded and taken care of in the court of (*c*) Chancery, that no decree shall be made against an infant without giving him a day to show cause against it, when he comes of age. An infant may by his *prochein ami* call his guardian to an account, even during his minority. If a stranger enters, and receives the profits of an infant's estate, he shall, in consideration of this court, be looked upon as a trustee for the infant.

2 Vern. 342, *per* Holt, C. J., in his argument of the case of Lord Falkland and Bertie. [But he is not bound to wait till he comes of age before he seeks redress against

the decree, but may apply for that purpose as soon as he thinks fit; and may do this, it is said, by bill of review, re-hearing, or by original bill, alleging specially the errors in the former decree. Richmond v. Tayleur, 1 P. Wms. 736.] (*c*) This court will decree building leases for sixty years of infants' estates, when it appears to be for their advantage. 2 Vern. 224. It will not suffer an infant to be prejudiced by the laches of his trustees. 2 Vern. 368. Nor of his guardian. Pr. Ch. 151.—A court of equity may, by the approbation of an infant's relations, allot the infant maintenance out of a trust-estate, though there be no provision in the trust for that purpose; and this is founded on natural justice. 2 Vern. 236. [It may make an order of maintenance for an infant, though no case be depending. *Ex parte* Whitfield, 3 Atk. 315; *Ex parte* Kent, 3 Br. Ch. Rep. 88.] ‖ By 52 Geo. 3, c. 32, the courts of Chancery and Exchequer are enabled in any case depending, to order any dividends due to an infant in any of the stocks or funds in the Bank of England, (extended by 52 Geo. 3, c. 158, to South Sea, East India, and all other stocks,) standing in the name of the infant, and to which he is beneficially entitled, to be paid to his guardian, or to any other person in the discretion of the courts, for the maintenance and education of the infant, or otherwise for his use and benefit.—It will not permit trustees to break in upon the capital for the purpose of maintenance; and it has very rarely done so itself, even on a petition preferred; though frequently for the purpose of putting the child out in life. Walker v. Wetherall, 6 Ves. 473.‖ [It may change, too, the nature of the infant's estate, Lord Winchelsea v. Norcliff, 1 Vern. 435; Inwood v. Twyne, Ambl. 417; 2 Eden, 148, S. C.; and so, it seems, may guardians and trustees, where it is manifestly for the benefit of the infant. See the last case. The question, as to the power of a trustee to change the infant's estate, arising in Vernon v. Vernon, Ch. November, 1789, Lord Thurlow stated it to be a general rule, that a trustee should not *ad libitum* change the nature of an infant's estate; but held, that the trustees having, in that case, applied the personal estate of the infant in performance or satisfaction of a condition, upon which the infant was entitled to a real estate, that was not a ground for raising a trust against the heir, in favour of the personal representative of the infant. 1 Fonbl. Eq. Tr. 82, note (*f*).] ‖The Court of Chancery has ordered the personal property of an infant under a will, which was given over in the event of his death under age to be changed into real, though there was no clause in the will to authorize such a change; but with this qualification, that the land purchased should not be conveyed in trust for the infant, his executors and administrators, until he should attain the age of twenty-one, and afterwards for him and his heirs. Ashburton v. Ashburton, 6 Ves. 6.‖

If there are several parties to a suit in Chancery, and it appears that any one of the defendants is an infant, and any thing is prayed against him, by the decree, he must have a day given him to show (*a*) cause; the words of which decree are thus; viz. *And this decree is to be binding to the said J S, the infant, unless he shall within six months after he shall attain his age of twenty-one years, (being served with (b) process for that purpose,) show into this court good cause to the contrary.*

Vern. 295; 2 Vent. 351. 2 Vern. 232. (*a*) ‖ If the decree be without a day to show cause, it is error apparent, and will support a bill of review. 17 Ves. 178.‖ (*b*) This process is by way of *subpœna*, to be served on the defendant at his coming of age, and it is a judicial writ, and must be returned in term-time. ‖ If he is served with it within six months after his coming of age, the decree is made absolute without entering an appearance, if he does not appear. Savage v. Carroll, 1 Ball and Beatty, 651. And where an infant who had a day to show cause, having attained twenty-one, left the kingdom to avoid his creditors, permission was given to serve the clerk in court with the *subpœna*. Elcock v. Glegg, 2 Dick. 764.‖

If he shows no cause, the decree is made absolute upon him; but when he comes of age, and shows cause within the six months, he may put in a new answer, and make a new defence; for it would be highly unreasonable to conclude him by what his guardian had done, who perhaps made an improper defence, or mistook the nature of his case; and if the infant notwithstanding were to be bound thereby, it would be to no purpose to give him a day to show cause.

Abr. Eq. 280.

Therefore if a guardian put in an answer to a bill in Chancery for

an infant on oath, such answer shall not conclude the infant, nor be (*a*) read in evidence against him; for the effect of an infant's answer to a bill in Chancery is to no other purpose than to make proper parties, so as to have an opportunity to take depositions, and to examine witnesses, to prove the matter in question.

Eccleston v. Petty, Carth. 79; 3 Mod. 259; Show. 89, S. C. [Fountain v. Cain, 1 P. Wms. 504; Napier v. Lady Effingham, 2 P. Wms. 401; Wrottesley v. Bendish, 3 P. Wms. 237; Bennett v. Lee, 2 Atk. 531. And exceptions cannot be taken to an infant's answer. Strudwick v. Pargiter, Bunb. 338; Copeland v. Wheeler, 4 Br. Ch. Rep. 256. And in a suit against an infant, the service of *subpœna* to hear judgment must be on the guardian, not on the infant, Taylor v. Atwood, 2 P. Wms.] (*a*) If an infant puts in an answer by guardian, and there is a decree against him without any day given him to show cause, such answer shall not be read or admitted as evidence against him when he comes of age; but, if a superannuated defendant puts in an answer by his guardian, it shall be read against him at any time after, for he is supposed to grow worse, and is not to have a day to show cause. Abr. Eq. 281, Leven and Caverly; Pr. Ch. 229, S. C.

But it seems, that if lands are devised to be sold for payment of debts; they may be decreed to be sold without giving the heir who is an infant a day to show cause when he comes of age; for nothing descends to him; but, if he is decreed to join in the sale, he must have a day after he comes of age.

2 Vern. 429, Cooke and Parsons, decreed; Pr. Ch. 185, S. C. and S. P.; Blatch v. Wilder, 1 Atk. 421; Uvedale v. Uvedale, 3 Atk. 117. [It is said by the court in Whitechurch v. Whitechurch, 9 Mod. 128, that "in cases of trusts, infants are always bound by decrees of this court; and so they are, where the will of the ancestor is contested, and it is either set aside or confirmed in equity after trial on an issue *devisavit vel non*, or where it is otherwise set aside without a trial at law; and there is scarcely any case where an infant hath time to show cause against a decree, but where it is necessary for him to join in a conveyance to complete the estate, and where such conveyance is of the inheritance, as in decrees of foreclosure of mortgages," &c. And even in the case of foreclosure, it is not permitted to him to ravel into the accounts, nor is he entitled to redeem; he is entitled merely to show error in the decree. Mallack v. Galton, 3 P. Wms. 352; Lyne v. Willis, Rolls, 13th May, 1730, Ibid.] ‖ Though it be usual on a bill of foreclosure against an infant to decree the foreclosure, with a day to show cause; yet, if the mortgagees consent to a sale, the court will direct an inquiry, whether it will be for the infant's advantage. Monday v. Monday, 1 Ves. & Beam. 223; Goodier v. Ashton, 18 Ves. 83.‖—[An infant may file a bill of review to reverse a decree, notwithstanding it hath been enrolled upwards of twenty years. Lytton v. Lytton, 4 Br. Ch. Rep. 441.]

‖Where copyhold lands were mortgaged by lease and release as freehold, and there was a covenant for further assurance, it was holden that this covenant bound the lands descended to the customary heir; but he being then an infant, the court refused to decree a foreclosure; and would go no further than directing the account, and that in default of payment, the plaintiffs, the mortgagees, should be let into possession, and hold and enjoy until the heir should attain twenty-one, at which time he should surrender; and a day was given to him to show cause against the decree after his coming of age.

Spencer v. Boyes, 4 Ves. 370.‖

[It hath been holden, that an infant, when plaintiff, is as much bound, and as little privileged, as one of full age; unless gross laches, or fraud and collusion, appear in the *prochein ami;* in which case the infant may open the decree by a new bill.

Lord Brook v. Lord and Lady Hertford, 2 P. Wms. 518; Gregory v. Molesworth, 3 Atk. 626. See an exception to this rule in the case of Lady Effingham v. Napier, 3 Br. P. C. 301, where the House of Lords gave Sir John Napier leave to show cause, when he came of age, against his own decree. And an infant's neglect to put in a

replication shall not be taken as an admission of the truth of the answer, for an infant can admit nothing. Legard v. Sheffield, 2 Atk. 377; vide *contr.* Thurston v. Nutton, Tr. 1733; 3 P. Wms. 237.—If the court detect an incautious submission in the bill of an infant to any thing that will be prejudicial to his interests, they will direct an amendment. Serle v. St. Eloy, 2 P. Wms. 387.]–‖ The court will change the next friend upon his not proceeding with a cause. Ward v. Ward, 3 Meriv. 706.‖

‖If a decree be taken by consent, an infant is bound by it, though there were no reference to a master, to inquire whether it was for his benefit. So, an order of maintenance, though usually made on a reference to a master, if made without, will be equally binding.
Wall v. Bushby, 1 Br. Ch. Rep. 484.‖

[If it be represented to the court, that a suit instituted on the behalf of an infant is not for his benefit, an inquiry into the facts will be directed to be made by one of the masters, and if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings. (*a*) So, if two suits (*b*) for the same purpose, are instituted in the name of an infant, by different persons acting as his next friends, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit, and when that point is ascertained, will stay proceedings in the other suit.

Da Costa v. Da Costa, 3 P. Wms. 142. (*a*) ‖ But no reference will be made on an application of the *next friend* to see whether a suit he has himself instituted is for the infant's benefit, for in commencing the suit, he has taken upon himself to determine that it is so. Jones v. Powell, 2 Meriv. 141.‖ (*b*) Mitf. Eq. Pl. 27. So Sullivan v. Sullivan, 2 Meriv. 40.]

2. *How they are to appear when they sue or are sued.*

Regularly, an infant plaintiff must appear by *prochein ami* or guardian, but must defend by guardian: but in neither case can he appear by attorney, (*a*) for an attorney's appearing for him is without warrant, for an infant cannot give him authority *ad perdend. et lucrand.* as the warrant of attorney purports; and therefore he is to appear by guardian assigned either by the court, or by writ of Chancery, and such guardian hath his warrant from the court, not from the infant, and ought to be one of an estate; for if he misbehaves himself, an action of deceit lies against him.

Palm. 225, 250; Roll. Abr. 287, 288. β An appearance entered by a plaintiff for an infant defendant is irregular. Nun v. Curtis, 4 Dowl. 479. And if an infant appear in person not by attorney nor *prochein ami*, it is error in fact. Castledine v. Mundy, 1 Nev. & M. 635; 4 B. & Adol. 90.*g* (*a*) ‖ He cannot therefore be an informer on a penal statute, for by 18 Eliz. c. 5, every such informer "must exhibit his suit *in proper person*, and pursue the same only by himself or his attorney." Say. Rep. 51.‖

If a judgment be against an infant, and the infant bring a writ of error to reverse it, he ought to assign the error by guardian, and not by attorney.

Co. Ent. 289; Cro. Ja. 250. β If upon the return to a *certiorari*, the plaintiff in error rely upon infancy, disclosed by the record as a defence, it must be specially assigned as error in fact, that the defendant in error may take issue upon it. Hankins v. Kingsland, 2 Hall, 425.*g*

β An infant must assign errors *coram vobis* by guardian.
Beven v. Cheshire, 3 Dowl. 70.*g*

In replevin the defendant being an infant appeared for two terms by attorney, and the third term by guardian, and for this cause the judgment was reversed: but an infant may appear by guardian, and when he comes of full age, he may make an attorney in the same suit, and this shall not be error.
Moore, 665; Palm. 229.

If in a writ of right the demandant sues by *prochein ami*, and issue is

joined upon the plea of non-tenure, and before trial the demandant comes of full age; though he was well admitted to sue by *prochein ami*, yet now he ought to appear by attorney. But the tenant not having taken exceptions at the trial, but admitted him to be of full age, whether this can afterwards be assigned for error *dubitatur*.

Cro. Ja. 580, Stone v. Marsh; Bulst. 24, S. C. and S. P., seems to be admitted; but adjudged *per totam curiam*, that it could not be assigned for error, and therefore the first judgment was affirmed.——And now by the 21 Ja. 1, c. 13, it is enacted, that after verdict given in any court of record, judgment shall not be stayed or reversed by reason the plainitff in ejectment, or other personal action, being under age, did appear by attorney, and the verdict passed by him; and by 4 Ann. c. 16, § 2, after judgment by confession, *nil dicit*, *non sum informatus*, or after writ of inquiry executed.—[In Chancery the course seems to be, to proceed in such case without any change. Pr. Reg. 195.]

In an ejectment against an infant the defendant cannot appear by *prochein ami;* for a guardian and *prochein ami* are distinct, and the suit by *prochein ami* was not before the statutes of Westm. 1, c. 48, and Westm. 2, c. 15, and is given in case of necessity,(*a*) where an infant is to sue his guardian, or is eloigned, or that the guardian will not sue for him. Adjudged by three judges against one, upon a writ of error upon a judgment given in Durham, and the first judgment reversed accordingly.

Cro. Ja. 640; Palm. 295; Roll. Rep. 257; Simpson v. Jackson, S. C., adjudged; Hutton, 92, S. C. cited; F. N. B. 27; S. P. Styl. 369, S. P. (*a*) But for the profits received after fourteen, the infant was admitted by guardian to sue in account against his guardian in socage; for he must charge him as bailiff. Cro. Ja. 219.

But in all cases where an infant is plaintiff, unless in these special cases, the suit shall be by guardian and not by *prochein ami*.

Palm. 296, *per* Dodderidge. But 2 Inst. 390, it is said, whether the infant be eloigned or no, he may sue by *prochein ami;* but perhaps in all cases where he is plaintiff, except these, he may sue by guardian or *prochein ami;* and for this vide F. N. B. 27; 2 Inst. 261, 390; Co. Lit. 135 b; Cro. Car. 86; Hutt. 92; Jones, 177; Hetl. 52; Lit. Rep. 60; Cro. Ja. 161, 641; Bridg. 74. β A Court of Chancery will, upon its own motion or upon petition, direct a reference to ascertain whether a suit prosecuted for an infant by *prochein ami* is for the interest of the infant. The People v. New York, C. P., 11 Wend. 164.*g*

β In a suit by an infant by a *prochein ami*, the latter must be appointed before the suing out of process.

Wilder v. Ember, 12 Wend. 191.

Where a father during the absence abroad of his infant son, commenced an action for *crim. con.*, as his *prochein ami*, held that he was entitled to do so.

Morgan v. Thorne, 9 Dowl. 228.*g*

The respective courts in which the suit is commenced must (*b*) assign a proper guardian to the infant; and therefore if an infant be sued, the plaintiff must move to have a proper guardian assigned him.(*c*)

Styl. 369; Bridg. 74; Roll. Rep. 303. (*b*) The course hath been to allow some of the officers of the court, who, by reason of their skill, make the best guardians, and *prochein amis*, for the advantage of the infants. 2 Inst. 261.——The Court of Chancery may assign one of the six clerks to be guardian to an infant. 2 Ch. Ca. 163. ——But, if there be a guardian appointed by the father, on *ex provisione legis*, as guardian in socage, who acts accordingly, he only shall be admitted to sue for the infant, unless he hath misdemeaned himself. Sid. 424.—[But it said by Lord King, C., that no one can have a testamentary guardian for this purpose. 2 Str. 709.]—— The court may discharge one guardian, and appoint another. Styl. 456.——In the Common Pleas a record of the admittance is made, but in the King's Bench it is only recited in the count, J S *per* A B *guardianum suum ad hoc per cur. specialiter admissum queritur*, &c. 3 Co. 53 b; and vide 1 Sid. 173, 342; Cro. Eliz. 158; 2 Inst. 261;

(K) Of the Privileges of Infants.

3 Mod. 236; 1 Lev. 224.——The appearance must be entered in the name of the infant, *scilicet prædict. Catharina per* J S, *guardian, venit, et dicit, quod ipsa*, &c. not *ipse*, &c. 3 Mod. 236, and the above authorities. If the guardian for the defendant is admitted *ad prosequend.*, this is erroneous. Cro. Ja. 641; Palm. 296. See 8 Mod. 25, *contr.*—But an admission *quod sequatur* is good in a common recovery. Sid. 446; Mod. 48; 2 Saund. 95.—The infant cannot revoke the authority of the guardian Palm. 252; and vide Salk. 176; Holt. 153; 12 Mod. 372; Ld. Raym. 555. A guardian ordered to acknowledge satisfaction for so much as he received upon a judgment. Moore, 852.—The admission of the *prochein ami* or guardian may be either *special*, to prosecute or defend a particular action; or *general*, to prosecute or defend *all* actions whatsoever, Archer v. Frowde, 1 Str. 304, though it is said, that by the practice of the Court of King's Bench, a special admission of a guardian, to appear in one cause, will serve for others. Ibid. 305. For the manner in which a guardian or *prochein ami* is appointed in B. R., see Tidd's Pr. 90, 91. (*c*) || If he has appeared by attorney, the plaintiff must move that the appearance be amended by the substitution of a guardian. Hindmarsh v. Chandler, 7 Taunt. 488 ||—For if an infant defendant appear by attorney, it is error. 8 Co. 58 b; 9 Co. 30 b. But, if an attorney undertake to appear for the infant, the court will oblige him to do it properly. Straton v. Burgis, 1 Str. 114.—The order for the admission of *prochein ami* should be obtained before declaration, and a copy thereof annexed to it; else the defendant is not compellable to plead; Sty. Pr. Reg. 264; and the plaintiff's attorney, if required, must give notice to the defendant's attorney of the place of abode of *prochein ami*. Tomlin v. Brookes, 1 Wils. 246. So, the rule or order of the admission for a guardian should be obtained before plea, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant may appear by guardian within a certain time, usually four or six days; or in default thereof, that the plaintiff may be allowed to name a guardian, to appear and defend for him. Kerry v. Cade, Barnes, 413; Gladman v. Bateman, Ibid. 418. And a similar order may be obtained, where the defendant neglects to appear at all. Stone v. Atwoll, 2 Str. 1076; Shipman v. Stephens, 2 Wils. 50; Tidd's Pr. 91.—|| If a *prochein ami*, or guardian, be changed pending an action, the fact ought to be entered on the record. Davies v. Lockett, 4 Taunt. 765.||

|| Where judgment of nonsuit is given in action against an infant, it is no ground of error that the infant appeared by attorney, though it is so where the judgment is *against* the infant.

Bird v. Pegg, 5 Barn. & A. 418; and see 1 Moo. 250.||

An appeal of death by an infant must be prosecuted by guardian; yet, if the infant comes into court, and says that he will relinquish it, and yet the guardian will prosecute it, the court may in discretion discharge such guardian, and assign another; for it is not reasonable that an infant be bound to continue a suit against his will, which demands nothing but revenge, and will be chargeable to him.

Roll. Abr. 288; 1 Ld. Raym. 555.

In an action against baron and feme, the feme, being within age, ought to appear by guardian.

26 Ass. 40; Roll. Abr. 288, S. C.

If a common recovery be suffered, and the baron and feme, in right of the feme, (the feme being within age,) be vouched, and they appear by attorney, and vouch over, and so a common recovery be had, this is error; for though the baron is of full age, yet the feme being within age, she ought to have appeared by (*a*) guardian; for the husband cannot make an attorney for his wife in a matter that concerns her inheritance, for then he might defeat her of her inheritance, especially in a common recovery, which is now but a common assurance; and their coming in as vouchees makes it the stronger; for the vouchee loses all the right to the land, and gives recompense to the tenant.

Roll. Abr. 288; Bridg. 74, 228; Palm. 224, 244, 250, &c.; Cro. Eliz. 379; S. C.

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Holland and Lee. (*a*) The husband cannot disavow a guardian made by the court for his wife. Vent. '85.

If in an *assumpsit* (*a*) against baron and feme, the feme, being within age, appears by attorney, and thereupon judgment is given against them, this is error.

Vent. 185, Freeman and Boddington, adjudged; 2 Lev. 38, S. C.; 2 Keb. 878, S. C., because the appearance was *per attornatum* of the husband only, and there said, though in a real action, the wife must appear by guardian; yet perhaps it may be otherwise in a personal action, for the damages will survive. (*a*) But, if they bring an action, they may sue by attorney, and the baron shall name an attorney for both. 2 Saund. 213, *per curiam arguendo.*

If an action of debt be brought against an infant executor, he cannot appear by attorney, but ought to appear by guardian, else it is error, because otherwise he might be at great prejudice; for assets may be found in his hands, and so judgment shall be given to recover the debt, damages, and costs against him *de bonis testatoris, si, &c. si non*, the damages and costs *de bonis propriis*, (as it was done in this case,) and perhaps the infant had a release or acquittance to plead, and so he shall be charged *de bonis propriis* by his ill pleading, without any remedy against the attorney; but, if a guardian mispleads, and loses thereby, an (*b*) action lies against him, and therefore his being executor cannot make him as a man of full age.

Roll. Abr. 287, 288; Poph. 130; Cro. Ja. 420; Roll. Rep. 380, S. C. (*b*) That an action in such case lies against the guardian. Palm. 229; 2 Leon. 59; Cro. Ja. 641; Mod. 49. But no action lies against a *prochein ami*, for if he loses in such action, he is not concluded thereby, but may resort to his action of a higher nature. Palm. 296, *per* Dodderidge.

But, if an infant (*c*) executor brings an action as executor by attorney, and hath judgment to recover, this is not erroneous, because for his benefit.

Poph. 130; Cro. Ja. 441, S. C.; and there said, there is a difference where an infant executor is plaintiff, and where defendant, and being plaintiff, where he recovers or not; for if judgment is given against him where he is plaintiff, it seems all one as if he were defendant. (*c*) If an infant administrator appears by attorney, it is error, though judgment be given for him. 3 Bulstr. 180; but Roll. Abr. 288, *cont.*, and vide Vent. 103; Cro. Eliz. 541; 2 Saund. 213; Mod. 47, 298.

If an infant and man of full age are made executors, they may (*d*) bring an action as executors, and the infant may sue by attorney without making any *prochein ami*, (*e*) because he sues in the right of the testator, and not in his own right.

Roll. Abr. 288; Countess of Rutland's case adjudged, in which the executors recovered in the action. Cro. Eliz. 278, S. C.; 2 Saund. 212, 213, S. P., adjudged *per Cur. cont.* Twisden; for he that is of full age may make an attorney, for him that is within age. Mod. 47, 72, 296, adjudged by three judges against Twisden; Vent. 102, adjudged; Sid. 449, adjudged; Ld. Raym. 600. (*d*) But, if an action is brought against them, he that is under age must appear by guardian. Styl. 318, adjudged; and vide 3 Mod. 236, said to be agreed; 2 Str. 784, *acc.* (*e*) This is founded upon another reason, viz. upon necessity; for it is absolutely necessary that all who are appointed executors by the will should be made parties to the action, and where there are several executors, the act of one shall conclude his companion, and therefore the general appearance *per attornatum* is good for all of them. Carth. 124, *per* Holt, C. J.

In replevin in C. B. against A, B, and C, they all *per J S attornat.* made conusance as bailiffs to J N, and at the trial the plaintiff was nonsuit, and the defendants had judgment upon a writ of error in B. R. It was assigned for error, that A, one of the defendants, was an infant, and yet had appeared and pleaded by attorney; but notwithstanding, the judgment was unanimously affirmed, though for different reasons. Three of the judges held, that it ought to be affirmed because the defendants are *in auter droit*, and

they all make but as one bailiff, and that the disability of the servant shall not prejudice his master. And they agreed that the case of executors is the same in reason with the present case. They agreed likewise, that there is a difference where the infant is plaintiff, and where he is defendant, and that an avowant is in nature of a plaintiff, and so are the bailiffs who make conusance. But Holt, C. J. differed; he held, that this appearance of the infant was irregular, for he ought to plead *per guardianum*, and the joining the other defendants with him signified nothing, so as to charge the infant, for if the judgment pass against him it shall be for the damages *de bonis propriis*, and he shall be amerced; therefore where he is joined, or where he is single, there is no manner of difference in reason, for in both cases the loss is the same, if judgment is against him. But he agreed that in this case the judgment should be affirmed, (*a*) because the plaintiff did not take advantage of the infancy in time, according to the general rule which he laid down, viz., that a man shall never assign that for error which he might have pleaded in abatement; for it shall be accounted his folly to neglect the time of taking that exception.

Carth. 122, 179, Coan v. Bowles, adjudged; Show. 13, 165, S. C.; Salk. 93, 205, S. C., adjudged, because the plaintiff might have pleaded this in abatement. 4 Mod. 7, S. C. but not S. P. (*a*) But one of the judges was of opinion, that this matter might be assigned for error, though it was pleadable in abatement of the conusance. Carth. 123.

The testator had obtained a judgment, and made a person of full age and two infants executors; he of full age proved the will, and he alone brought a *scire facias*, setting forth the truth of the case, and had judgment, whereon error was brought, and assigned that all ought to have (*b*) joined in the *scire facias;* but by all the justices, on advice with the civilians, it was ruled not to be error; for the others cannot prove the will during their nonage; and the judgment was affirmed; for the execution of the judgment shall not be delayed till the infants come of full age.

Lev. 181, Hatton v. Mascal, adjudged in the Exchequer Chamber on a writ of error out of B. R.; and vide Raym. 198, S. C. (*b*) And vide Yelv. 130, where it is held, that an infant cannot be summoned and severed.

The plaintiff, being an infant, had sued by his guardian, but the entry on the roll was no more but *per T S guardianum suum*, omitting the clause *ad hoc per Curiam specialiter admiss.* as the common course is, and as it was alleged it ought to be: but *per Curiam* the entry is sufficient; for in fact, if the guardian was not admitted by the court, a writ of error lies.
Carth. 256.

An infant cannot bring a bill in Chancery but by his *prochein ami*, and such *prochein ami* must take care of it; for if the bill is dismissed, he must (*c*) pay the costs thereof.

(*c*) And therefore any person may bring a bill as *prochein ami* to an infant without his consent, because it is at his peril that he brings it, to be answerable for the event. Abr. Eq. 72, Andrews and Cradock. βCourts of Chancery upon their own motion or upon petition, will direct a reference to ascertain whether a suit prosecuted by a *prochein ami* for an infant, is for the benefit of the latter. People v. New York, C. P., 11 Wend. 164.β

And it is said, that in Chancery a guardian cannot be otherwise appointed than by bringing the infant into court, or his praying a commission to have a guardian assigned him.

Abr. Eq. 260, Lloyd and Carew. In Tappen v. Norman, 11 Ves. 563, it was holden, that by the practice of the court, a guardian could not be assigned on motion, to an

infant defendant who was abroad, to put in his answer; but that a commission must go. But in Jongsma v. Pfield, 9 Ves. 357, the court made an order in such a case upon motion, upon the production of similar orders by the Registrar.

Where a bill is brought against an infant (if in town) he must appear in court, and have a guardian assigned him, by whom he may defend the suit; if in the country, he sues out a commission to assign a guardian, and put in his answer; and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by the guardian, it will be irregular.

But when the infant neglects to appear, or to have a guardian assigned, it is a motion of course (he being in contempt to an attachment) to pray for a messenger (*a*) to bring him into court, and when he is there, the court always assigns him a guardian: but it is doubted whether this can be done against a peer of the realm who is an infant, and whose person, though not sacred, is yet privileged.

(*a*) Eglas v. Le Gros, 9 Ves. 12.

[An infant is not liable to costs, but only his *prochein ami;* and if he refuse to pay them, on demand, the court will grant an attachment against him.(*b*) Yet, where an infant plaintiff was taken in execution for the costs, the court refused to discharge him on motion.(*c*) And it hath been adjudged, that costs are payable by an infant defendant.(*d*)

Grave v. Grave, Cro. El. 33; Turner v. Turner, 2 P. Wms. 297; 2 Str. 708; Slaughter v. Talbot, Willes, 190. The *prochein ami* being liable to the costs, he cannot of course be examined for the infant, Hopkins v. Neil, 2 Str. 1026, though his declarations may be received against the infant. James v. Hatfield, 1 Str. 548. (*b*) Slaughter v. Talbot, Barnes, 128. Where the bill of an infant is dismissed with costs upon a fact, which, though not known when the bill was filed, yet might with reasonable diligence have been known; the *prochein ami* will not be allowed the costs out of the infant's estate. Pearce v. Pearce, 9 Ves. 548. *β* An infant who prosecutes an unjust claim at law, and thus compels the defendant to come into equity for an injunction and relief, and who then sets up an inequitable defence, must pay costs. Price v. Sykes, 1 Ruff. 87.*g* (*c*) Gardiner v. Holt, 2 Str. 1217; Finley v. Jowle, 13 East, 6. (*d*) Dy. 104; Hamlen v. Hamlen, 1 Bulstr. 189. An order appointing a guardian for an infant defendant may be obtained on the application of the plaintiff. Williams v. Wynne, 10 Ves. 159; Earl of Orford v. Churchill, 3 Ves. and Beam. 59.

When an infant sues, it is the practice with the courts of law, to stay the proceedings till the *prochein ami*, guardian, or attorney hath given security for the costs; and where he has appeared to be in low circumstances, or incompetent to discharge the costs, they have, on motion, appointed a new *prochein ami*, or guardian of sufficient ability.(*e*) It hath been said (*g*) that a similar practice obtains in the Court of Chancery, and that if a *prochein ami* be insolvent, the defendant may apply in order to have a solvent *ami* named. But in Squirrel v. Squirrel, (*h*) in Lincoln's Inn Hall, 17 Dec. 1791, a bill having been filed by a feme covert by her next friend against her husband, it was moved on the part of the defendant, that all proceedings in the cause might be stayed, until the *prochein ami* should give security for costs, or another *prochein ami* be named, which application was supported by an affidavit of the bad circumstances of the *prochein ami*. But Lord Thurlow refused to make any order; and said, he did not conceive the court could inquire into the circumstances of any *prochein ami*, more than those of any common plaintiff, in which case, though the plaintiff should be insolvent, the defendant cannot help himself; that in the cases of an infant or feme covert they were obliged to sue by their next friend, in order that there might be some person *sueable* for the costs; (which the infant and feme

covert themselves are *not*;) but that the court contented itself with making somebody *amesnable* in this respect, without going into an inquiry concerning his ability.—There was in this case indeed a circumstance upon which his lordship in some degree relied, viz., that this application was made after the defendant had *answered*, which might be considered as a waver of any application of this nature, though it was alleged on his part that he had not discovered the circumstances of the *prochein ami* until after answer.

Doe v. Alston, 1 T. R. 490. (*e*) 2 Str. 708. β The *prochein ami* of an infant plaintiff may be changed, and, being thereby released from all responsibility for costs, may be a witness for the infant. Burks v. Shain, 2 Bibb, 341.*g* (*g*) Turner v. Turner, 2 P. Wms. 297. (*h*) 2 Cox's P. Wms. 297, note.]

β If an infant who is arrested does not appear to the action, nor take any notice of his arrest, the court, on motion of the plaintiff, and notice to the infant, will appoint a guardian *ad litem* for him.

Fearing v. Clawson, 1 Hall, 55.

An infant may commence an action, but he cannot file his declaration until some person has been appointed his *prochein ami* or guardian.

M'Daniel v. Nicholson, 2 Rep. Co. Ct. 344. See Kid v. Mitchell, 1 Nott & M'Cord, 334.*g*

(L) Of the Privilege of Infancy as to the Parol's demurring: And herein,

1. *In what Actions the Parol shall demur.*

THE parol's demurring until the full age of the infant is a dilatory plea or temporary bar, and peculiar only to the feudal law; for in the civil law, the guardian was party to the suit instead of the infant; and if there was *mala fides* in his defence, he was to answer it to the infant. But the wardship in the feudal law was of another nature; for the guardian has the whole profits of the estate, and also the marriage of the infant, which was in order to breed him up to arms, and to marry him to such person as he thought might continue the martial strain, that so the ward might subserve the original design of the tenure.

Gilb. Hist. C. P. 54, 56; 3 Buls. 143; Roll. Rep. 325; 4 East, 493, referred to by Lawrence, J.

Hence it was that the guardian was not trusted with the action, nor could the infant, by reason of his imbecility and want of understanding, be admitted to prosecute or defend. But this establishment was confined to such cases where the right of inheritance was in demand, and was not allowed to actions touching the possession. And the reason was from necessity; for if the infant was not allowed to defend his possession, he would be stripped of all he had during his minority. And so of injuries done by an infant the parol shall not demur, because then a general license would be given for infants to commit injuries; and therefore the prosecution of those actions was committed to the next friend, and the defence of the actions against an infant to a special guardian assigned by the court.

Gilb. Hist. C. P. *ubi supra;* 6 Co. 3 b, Markal's case.

And therefore in all cases where a naked right in fee descends from any ancestor to an infant, there, in every action ancestorial brought by the heir within age, the parol shall demur; for the law in this case judges it less prejudicial that the infant should be delayed of his right, than that he should run the hazard of losing it for ever, which he might be in danger of by his want of knowledge in setting forth his title as he ought to do.

6 Co. 3 b; Dyer, 133. ‖ It is extraordinary, seeing the origin of this privilege, that

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it should have been extended to heirs in socage. However, it has been so decided; but it is confined to heirs, and to heirs taking by descent, not by grant or purchase, and is not to be extended to an infant devisee sued by a specialty creditor of the devisor under the statute of 3 W. & M. c. 1; for before that statute was passed, the feudal tenures, and with them wardships, of which this privilege was the consequence, had been abolished. Plasket v. Beeby, 4 East, 485.‖

Hence, if an infant brings a writ of right as heir to his ancestor, and lays the esplees in his ancestor, the tenant may pray that the parol demur.

Roll. Abr. 137; 6 Co. 3 b.

So, in a *formedon in reverter* the parol shall demur, because he claims as heir in fee-simple to the reversion, and must lay the esplees in the donor.

6 Co. 3 b.

So, in all cases on the fee, as if an (*a*) action of debt on the obligation of the ancestor be brought against the heir, there the parol shall demur, because that lays a burden on the fee, which by law is to be preserved entire until the infant come of age, since the profit was given away during his nonage to the lord.

Gilb. Hist. C. P. 56; Moore, 74; Dyer, 239; And. 10. (*a*) In a writ of debt against an heir he shall have his age, because at his full age he may discharge himself by saying he hath *riens per discent.* Roll. Abr. 140. If an ancestor dies indebted by bond, in which the heir is expressly bound, and leaves no personal assets, and the lands descend on an infant heir, whether equity will, during the minority of the heir, decree satisfaction, is made a *quære;* 1 Vern. 173, and there said, that infants may be sued in equity, and that there is no precedent that the parol shall demur; and in 1 Vern. 428, it is said by the master of the Rolls, that he thought such a decree reasonable; but the reporter adds a *dubitatur* to it. ‖ Where lands descend on an infant, the parol shall demur in equity, as well as at law, because he is equally incapable of defending himself in one court as the other. *Secus,* where he takes as special occupant, or there be not really a descent. Chaplin v. Chaplin, 3 P. Wms. 367. See Scarth v. Cotton, Ca. temp. Talb. 198; Davison v. Goddard, Gilb. Eq. Rep. 66; Uvedale v. Uvedale, 3 Atk. 117. But where satisfaction is sought out of real assets, so that the parol may demur, the court will now appoint a receiver of the real estate descended. Sweet v. Partridge, 2 Dick. 696; Docker and Horner, cited, Ibid. Where a testator devised estates to his heir at law, and charged one of them with the payment of two legacies, and afterwards died indebted on specialty, leaving his heir an infant; it was holden, that as to the estate charged, the parol should not demur. Mould v. Williamson, 2 Cox, 386.‖

But regularly in all real actions brought by an infant of his own possession the parol shall not demur; for the granting that the parol shall demur is a law introduced, not for the delay or prejudice of the infant, but for his advantage.

6 Co. 3 b; Cro. Ja. 467.

Therefore in assizes of *novel disseisin* and *mort d'ancestor*, the infant has not his age, because these actions are brought of his own seisin, or his ancestor's dying seised, which may be prosecuted during minority.

6 Co. 4 b.

So, if in assize the infant pleads a flat bar, and the bar is found against him, yet the assize shall be taken at large; because the law not allowing the parol to demur in this action, which is *festinum remedium*, they inquire of the seisin and disseisin, that the infant's whole title may be before the court, and he not suffer by his pleading.

48 E. 3, 33 b; Roll. Abr. 140; 2 Inst. 411; 8 Co. 50 a; 6 Co. 4 b.

In a writ of annuity against an heir he shall have his age, because he may discharge himself by saying he hath nothing by descent.

Roll. Abr. 140.

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So, if a man sues execution upon a statute merchant against an heir within age, and ousts him thereby, (*a*) an assize lies for the heir, for he shall have his age.

Co. Lit. 290; Roll. Abr. 140. (*a*) For the extent is void, which is made upon the possession of the infant. Hetl. 54.

So, if a man sues execution upon a recognisance against an heir within age, he shall have his age, though he be charged partly as tertenant.

3 Co. 13; Co. Lit. 290; 2 Inst. 89; Roll. Abr. 140.

So, upon a recognisance in nature of a statute staple on the 23 H. 8, c. 6, the infant shall have his age; for the statute in this particular is founded on the reason, and follows the course of the common law. And this privilege of infancy does not only protect the infant, but (*b*) all others who are affected by the judgment; as, if there be father and two daughters, and the father die, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

Bro. *Statute Merchant*, 33; Co. Lit. 290 a; Moore, pl. 203; Dyer, 239 a; Co. Ent. 12. (*b*) As, if the conusor of a statute merchant die, and his heir within age endow his mother, the land in dower shall not be extended during the minority of the heir, Co. Lit. 290.——But though upon a judgment in debt, or upon a statute or recognisance there can be no proceeding against an infant at common law during his minority, yet it is said there may be in Chancery. 2 Chan. Ca. 164, and vide Lev. 197, 198.

So, if a man recovers in an action of debt against the father, who dies, in a *scire facias* against the heir upon this judgment, he shall have his age.

Roll. Abr. 140; Co. Lit. 290.

In a *scire facias* against a tertenant to have execution of damages recovered against J S, if the tertenant be within age, and in by descent, he shall have his age.

Roll. Abr. 140; Co. Lit. 290.

In a writ of customs and (*c*) services, which is a writ of right in its nature, in which judgment final shall be given, an infant in by descent shall have his age.

Roll. Abr. 139, 141; 9 Co. 85 a. (*c*) Yet he may be distrained for rent during his minority. 9 Co. 95 a.

In a *cessavit* by (*d*) descent, though it be of its own cesser, the infant shall have his age, because he cannot tell what arrears there accrued; and if he does not make a true tender, he loses the whole for ever.

Co. Lit. 380, 381; Roll. Abr. 138; 2 Inst. 401; Pig. Recov. 61. (*d*) But, if it be a purchase it seems otherwise, because that it is not an ancient inheritance of the family, for which he was to be in ward; for which vide Plowd. 364 b; 6 Co. 4 b; 2 Inst. 401; Raym. 118; 3 Mod. 222.

In (*e*) a writ of dower the parol shall not demur for favour of dower; for the wife must be subsisted.

Roll. Abr. 137; 3 Bulstr. 141; Roll. Rep. 323; Cro. Ja. 393; 2 Brown. 118. (*e*) So, if a woman brings a *quod ei deforceat* upon a recovery had of land which she claimed to hold in dower, the parol shall not demur, because it is of the nature of a writ of dower. Roll. Abr. 137; 3 Bulstr. 135, 138; Roll. Rep. 251. But, if tenant in dower be disseised, and the disseiser die seised, his heir shall have his age against the feme. Roll. Abr. 137; 3 Bulstr. 142.

So, in dower against an infant, who makes default upon the *grand cape* returned, it was holden, that judgment shall be given upon the default; for the infant shall not have his age in dower, which being but for life, she may be totally defeated thereof by his frequent defaults.

Cro. Ja. 111; Cro. Eliz. 309, 638; 2 Brownl. 118; 2 Leon. 59.

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But in error to reverse a fine levied by the plaintiff and her husband, the heir is summoned as tertenant, and appears, and pleads that he is within age, and prays that the parol may demur; plaintiff counterpleads the age, showing that she was entitled to have dower before the fine levied, and now is barred of her dower by this fine, which is erroneous, and sets forth the errors, and seeks to be restored to her writ of dower. But upon demurrer and solemn argument it was adjudged, that the parol shall demur, and that she shall not have the advantage to take from him his age, having by the fine, so long as it stands in force, barred herself of her dower; and therefore the law shall rather favour the infant, whose privilege is immediate, than hers, which is but mediate after the fine reversed. But in Moore it is said, if he had not been tertenant, he should not have had his age in this writ of error. The reason seems, because then she would not have recovered her dower against him, and then it is not reasonable his nonage should stand in the way to hinder her from recovering her dower against another.

Cro. Ja. 392, Herbert v. Binion; Moore, 847, S. C.

In an attaint against the heir of the (*a*) feoffee, the parol shall not demur for the nonage of the defendant, for the mischief of the death of the petit jury, before his full age.

Roll. Abr. 137. (*a*) The same law in an attaint against tenant in dower within age, who was the wife of the recoverer, and is endowed of his possession. 1 Roll. Abr. 738, 739.

In a *quare impedit* the parol shall not demur for the nonage of the patron defendant, because the lapse may incur during his nonage.

Roll. Abr. 138; 3 Bulstr. 131, 142.

So, if the king presents, in right of the heir in ward, to a church of which another is patron, of the grant of the father of the ward, with warranty of the land to which this is appendant, who left assets to the ward, and the patron sues by petition to the king to repeal his presentation, showing the matter; the parol shall not demur for the nonage of the ward for the mischief of the lapse; and this suit is in the nature of a *quare impedit.*

Roll. Abr. 138; Roll. Rep. 324.

In a writ of estrepement against an infant he shall not have his age, because this action is in nature of a trespass, and this done by himself.

Dyer, 104; 2 Inst. 328.

In a writ of partition between (*b*) coparceners, age does not lie for the defendant, for nothing is demanded but a partition.

6 Co. 4 b; Co. Lit. 171 a. (*b*) The same law of joint-tenants and tenants in common. Hob. 179, adjudged.

In a (*c*) *per quæ servitia* the defendant shall not have his age, but shall be compelled to attorn, for he is not prejudiced in the inheritance by the attornment; for when he comes of full age he may disclaim to hold of him, or say that he held by less service, notwithstanding this attornment.

9 Co. 85; Co. Lit. 315; 2 Brownl. 84; Roll. Abr. 138. (*c*) The same law in a *quid juris clamat* against an infant. Co. Lit. 315; Roll. Abr. 138.

In a *per quæ servitia* if the tenant says the conusor is dead, his heir within age, the parol shall not demur for his nonage, though it may be the conusor was tenant in tail; for, it seems, the heir, if he was of full age, could not come to plead this, but the tenant may plead it, if it be true.

Roll. Abr. 138.

In a *quid juris clamat* by him in reversion against tenant in dower,

the parol shall not demur for the nonage of the demandant; for be he of full age, or within age, he ought to warrant the land to the tenant in dower, because of the reversion, by force of an act in law.

Roll. Abr. 138.

But if an infant in reversion brings a *quid juris clamat* against tenant for life, the parol ought to demur;(*a*) for he hath a warranty against his lessor by special deed, to which the plaintiff who is within age cannot bind himself.

Roll. Abr. 138; 6 Co. 4 a. (*a*) So, where the tenant for life hath a privilege not to be impeached of waste, &c.; Co. Lit. 320 a; 3 Bulstr. 137; 9 Co. 85; Roll. Rep. 323.

In a writ of *mesne* the parol shall not demur for the nonage of the demandant, because it is brought for the wrong and damage done to the demandant himself.

6 Co. 3 b; 9 Co. 85; Roll. Abr. 138, 139.

In a *contributione faciendâ* by one coparcener against another, the parol shall not demur for the nonage of the tenant, though he says that his ancestor died seised, and held *sine contributione faciendâ*.

Roll. Abr. 139.

In a *scire facias*(*b*) against the heir of him against whom the recovery was had, if the heir be in by descent from another ancestor, than he against whom the recovery was had, he shall have his age.

Roll. Abr. 139. (*b*) But in a *scire facias* brought by an infant, the parol shall not demur for the nonage of the demandant. Roll. Abr. 139.——But where it shall demur in a *scire facias* to execute a remainder limited in the ancestor, vide Moore, 16, 35. And. 24; Dals. 37; Kelw. 204; N. Bendl. 121.

If a man brings a(*c*) writ of error against the heir of him that recovered, being within age, and in by descent in the land, the parol shall not demur for his nonage, though perhaps he hath a release, or other matter to bar the plaintiff, which he hath not knowledge to plead within age.

Roll. Abr. 139. [But it seems, that in error, where the tenant pleads infancy, and is in by descent, he shall have his age. Herbert v. Binion, 1 Roll. Rep. 251, 323; Cro. Ja. 392, S. C.; Moore, 847, pl. 1148, S. C.; 3 Bulstr. 138, S. C.; Aland v. Mason, 2 Str. 861.] (*c*) Age lies not in a writ of deceit, 3 Bulstr. 135; Roll. Rep. 251, because the summoners and viewers may die. Cro. Ja. 392.

In a petition to the king in the nature of a *formedon* in remainder, the parol shall demur for the nonage of the petitioner.

Dyer, 136; Dals. 22; Moore, 35; Kelw. 205.

In an appeal of murder the parol shall not demur for the nonage of the plaintiff, 2 Inst. 320. Said to have been adjudged and approved by continual experience of late time; and the reason of failure of battle is of no force; for a man of seventy may have an appeal, and the defendant shall be ousted of battle.

Dyer, 137; 2 Hawk. P. C. c. 23, § 30.

At common law, if a man had been disseised, and the disseisee or disseisor had died, the heir within age, in a writ of entry *sur disseisin*, brought by the heir of the disseisee, or against the heir of the disseisor, being within age, the parol should have demurred till the full age of the heir respectively.

2 Inst. 257.

So, notwithstanding the disseisor had died(*d*) pending a writ of *novel disseisin* against him.

2 Inst. 257. (*d*) But, by the common law, if the grandfather had been disseised, and brought an assize, and died pending the writ, and after the father had brought a

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writ of entry *sur disseisin*, and pending this writ the father had died, if the son had immediately brought a writ of entry, the parol should not have demurred for his nonage. 6 Co. 4 b.

At common law in a *mort d'ancestor*, *aiel*, *besaiel* or cosinage, if the tenant had pleaded a feoffment or release from a collateral ancestor, with warranty, in bar, &c., the parol would have demurred.

2 Inst. 291.

By the (*a*) statute of Westm. 1, c. 47, it is enacted, "That if any one (*b*) purchase a writ of *novel disseisin*, and he against whom the writ was brought as disseisor dies before the assize be passed, then the plaintiff shall have his writ of entry (*c*) upon disseisin against (*d*) the heir or heirs (*e*) of the disseisor their ancestor, or against their heirs of what age soever they be. In the same wise (*g*) the heir or heirs of the disseisee shall have their writs of entry against the disseisors, their ancestors, or their heirs, of what age soever they be, if peradventure the disseisee die before that he hath purchased his writ; so that for the nonage of the heirs of the one party nor of the other, the writ shall not be abated, nor the plea delayed; but as much as a man can without offending the law, it must be hasted to make fresh suit after the disseisin.(*h*)

(*a*) 3 E. 1, c. 47. (*b*) So, though he dies before purchase of the writ; for this is put only to show the mischief of this particular case, whereas the body of the act is general. 2 Inst. 257. (*c*) This extends only to a writ in the *per*, and not in the *post;* so that if the heir of the disseisor makes a feoffment in fee, and the feoffee dies, his heir within age, in a writ of entry against him, shall have his age. 2 Inst. 257. ——So, it extends not to the vouchee or *prayee in aid*. 2 Inst. 257; 2 Leon. 148. If the heir of the disseisor takes husband, and has issue within age, and dies, and the disseisee brings a writ of entry against the tenant by the curtesy, and he prays in aid of the heir within age, he shall have his age; for this is a writ of entry in the *post*, being against tenant by curtesy. 2 Inst. 257. (*d*) This extends to the heir of the heir; so that in this special case a writ of entry in the *per* and *cui* is within the act. 2 Inst. 257, 258. (*e*) Special heir as in gavelkind, borough-english, &c., within this act. 2 Inst. 258. (*g*) By this clause express provision is made in case the disseisee dies before purchase of his writ. 2 Inst. 528. (*h*) Intended after the death of the disseisor, and fresh suit regularly is within a year and a day after his death, within which time continual claim is to be made. 2 Inst. 258.

By the statute of (*i*) Gloucester, c. 2, "If a child within age be holden from his heritage after the death of his cousin, (*k*) grandfather or great-grandfather, whereby he is driven to his writ, and his adversary cometh into the court, and for his answer allegeth a feoffment, or pleadeth some other thing, whereby the justices award an inquest, there whereas the inquest was deferred until the full age of the infant, now the inquest shall pass as well as if he were of full age."

(*i*) 6 E. 1, c. 2. (*k*) This put only for example; for it extends to mother, brother, sister, uncle, &c., after the death of any of which a *mort d'ancestor* lies. 2 Inst. 291. ——But this act extends not to actions *ancestral droiturel*, but giving the infant a trial during his minority, it gave it in such actions as he might not be forecloscd of his right, but at his full age might have recourse to a writ of a higher nature; and therefore, it extends not to any *formedon*, *dum non compos*, *infra ætatem*, *sur cui in vita*, &c. 2 Inst. 129; yet *vide* Bro. *Age*, 5.

β No valid decree can be made against an infant by default, or on answer by his guardian; but he must have a day in court, (usually six months,) after he shall come of age, to show error in the decree.

Mills v. Dennis, 3 Johns. Ch. 146. See Beeler v. Bullitt, 4 Bibb, 11; Wilkinson's admr's v. Oliver's representatives, 4 Hen. & Munf. 450; Glaze v. Drayton, 1 Desaus. 109; Guest v. Sims, 1 Ten. 79; Kelsall v. Kelsall, 2 My. & Keen, 409.*g*

‖ It seems that on a bill by simple contract creditors against the infant

heir of a trader under the 47 G. 3, c. 74, for sale of his real estate, the parol will demur as it does in suits for the same object by specialty creditors, for the statute meant only to put simple contract creditors on a footing with specialty creditors.

Lechmere v. Brasier, 2 Jac. & Walk. R. 287.

But where the estate descending is subject to a lien or equitable charge, the parol will not demur in a suit by creditors; since the encumbrancers would be entitled to an immediate sale, and the parol would not demur against them, and it is indifferent to the infant heir in what suit the sale takes place.

Brookfield v. Bradley, Jac. R. 632. These cases were prior to the 1 W. 4, c. 47, § 10, which enacts that in actions by and against infants, the parol shall not demur, but the proceeding shall be carried on as effectually as proceedings could before the act be carried on by or against infants, where according to law the parol did not demur.

But where an estate descends to the infant heir subject to a trust to sell for payment of certain encumbrances, it cannot be resorted to for payment of other specialty debts during the minority of the heir.

Scarth v. Cotton, Cas. temp. Talb. 198, from the Reg. Book, B. 1735, fol. 518; Jac. R. 635.

Where a bill for a partition was filed against infant *cestui que trusts*, the court directed the conveyance to be respited till they attained twenty-one.

Attorney-General v. Hamilton, 1 Madd. 214.‖

2. *Where the Parol shall demur without any Plea pleaded.*

The general rule herein is, that where a naked right in fee descends, of which the ancestor was once in possession, there, in an action ancestorel brought by the infant, the parol shall demur without plea; but the parol shall not demur without plea, where the ancestor died seised, or where the action is brought of the seisin or possession of the infant.

6 Co. 3 b, 4 a; Dyer, 137 a.

Therefore in a writ of right as heir to his ancestor, (*a*) the parol shall demur without any plea, because there is an action *ancestral droiturel*, and he lays the esplees in his ancestor.

6 Co. 3 b.—And this is not altered by the statute of Gloucester, c. 2. 2 Inst. 291. (*a*) Though the battel may be deraigned by the champions. Dyer, 137.

So, in a *formedon in reverter*, the parol shall demur without plea, because he claims as heir in fee-simple to the reversion, and not *per formam doni*, and therefore the right of the fee would be bound.

Roll. Abr. 137; 6 Co. 3; Dyer, 137.

But on a *formedon in descender* and *remainder* the parol shall not demur without plea, (*b*) because *voluntas donatoris in chartâ suâ manifeste expressa de cætero observetur*, and being founded on what is exactly expressed in the deeds, though it be a *droiturel* action, yet it may be prosecuted during minority; but, if the tenant plead in bar a warranty and assets, there, the parol shall demur, because that concerns also all the other inheritance of the infant.

Roll. Abr. 137; 2 Inst. 291; 6 Co. 4 a. (*b*) Because this is a writ of possession. Roll. Abr. 137.

In a *sur cui in vita* the parol shall demur for the nonage of the demandant, without any plea pleaded.

Roll. Abr. 137.

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In a writ of *warrantia chartæ* brought by an infant, the parol (*a*) shall not demur for his nonage, though the warranty was made to his ancestor.

Roll. Abr. 137. (*a*) Otherwise, if the defendant denies the deed. Roll. Abr. 141.

In replevin against an infant, if he avows upon the plaintiff, and the plaintiff shows forth the release of the father of the infant to hold by less services, yet the parol shall not demur.

Roll. Abr. 140.

In trespass *vi et armis* against an infant, who justifies, for a rent *aut hujusmodi*, as heir to his father, if the other shows forth a deed made by the ancestor in discharge, yet the parol shall not demur, but he ought to answer to the deed immediately.

Roll. Abr. 140.

In a writ of (*b*) right of ward the parol shall not demur for the nonage of the demandant, though this be a writ of right.

Roll. Abr. 137; 2 Inst. 112. (*b*) So, in *escheat, cessavit, droit, sur disclaimer* brought by an infant, because he hath the seignory in possession, in respect of which he claims, and no right to the land was ever in the ancestor. 6 Co. 3 b; Dyer, 137.

If an infant aliens within age, and dies within age, and his heir brings a (*c*) *dum fuit infra ætatem*, the tenant may pray that the parol may demur, and yet the action did not descend, but the right only; for the father could not have this action, because he died within age—said in (*d*) Markal's case, and seems to be intended without plea pleaded.

Dyer, 104. And this is not altered by the statute of Gloucester, c. 2. 2 Inst. 291. (*c*) So, in a *dum non fuit compos mentis*. 6 Co. 4. (*d*) 6 Co. 4 b.

If in a *scire facias* to execute a fine, by which the remainder was limited to the grandmother of the plaintiff, whose heir, &c., the defendant prays the parol may demur, yet he shall answer over, because he does not plead the deed of his ancestor.

And. 24, Sandys and Sir Edward Bray, adjudged; Dals. 37, S. C. adjudged; the rather, because no freehold is demanded by the writ, but an execution of the fine only. Kelw. 204, S. C. adjudged, upon the reason in Dals. Moore, 35, S. C. adjudged. Moore, 16, seems to be the same case adjudged, though the particular estate was determined in the life of the demandant's father; and there said, if the defendant had pleaded the deed of the ancestor, &c., it should have demurred. N. Bendl. 121, S. C. adjudged; 6 Co. 3 a, S. C. cited; Dyer, 138, like point cited.

3. *Upon what Plea pleaded the Parol shall demur.*

In an action of the possession of the infant himself, the parol shall not demur upon any plea pleaded.

6 Co. 3 b; Roll. Abr. 141.

As in a writ of entry of a disseisin done to himself, brought by an infant, if the tenant pleads the feoffment of the father of the demandant, with warranty to him, yet the parol shall not demur, because this is brought of his own possession.

6 Co. 3 b; Roll. Abr. 141.

So in an assize, the parol shall not demur for the nonage of the demandant, though the deed of his ancestor be pleaded in bar, because this is brought of his own possession, and the circumstances shall be inquired in it.

2 Inst. 411; 8 Co. 50; 6 Co. 4 b.

In a *formedon in descender*, if the tenant pleads the feoffment of the ancestor of the demandant, with warranty and (*e*) assets, and the demandant (*g*) denies the deed, the parol shall demur for the nonage of the demandant.

Roll. Abr. 141. (*e*) The same law, if a collateral warranty be pleaded in bar of this

action. Roll. Abr. 141. (*g*) But whether without denying the deed the parol shall demur, *quære;* and vide Roll. Abr. 141.

In a *quare impedit*, if a feoffment of an acre to which an advowson is appendant, with warranty of the ancestor of the defendant, is pleaded with assets from the same ancestor, though the defendant be within age, yet the parol shall not demur, for the mischief of the lapse incurring in the mean time.

Roll. Abr. 141.

In an action real, if the tenant pleads in bar the feoffment of the ancestor of the demandant, with warranty to J S, and his assigns, whose assignee he is, and says, that assets descended to the plaintiff; to which the demandant says, nothing descended; in this case the parol shall demur, because though the feoffment and warranty is not in question, but only the assets, which the infant may well try, yet if he takes this issue, the deed of the ancestor shall be holden to be confessed by him.

Roll. Abr. 142.

So, for the same reason, if in a *formedon in descender* the tenant pleads a feoffment by the ancestor of the demandant to A and B, the father and mother of the tenant, and to the heirs of the father with warranty, and that they are dead, and avers that assets are descended to the demandant within age, though the demandant says, that B, the mother of the tenant, is yet living.

Roll. Abr. 142.

In an (*a*) assize (*b*) against an infant, if the issue be whether the tenant be a *bastard* or *mulier*, which is to be tried by the bishop, by which his blood is to be bound perpetually, yet the parol shall not demur, because this is of his own wrong, and there shall be no wrong in this writ.

Roll. Abr. 142. (*a*) But otherwise it is in a *formedon in descender;* for there if the issue be, whether the tenant be a bastard, the parol shall demur. Roll. Abr. 142. (*b*) But otherwise it is, if the issue be, whether the demandant be a bastard. Roll. Abr. 142.

4. *For the Nonage of what Person the Parol shall demur.*

The parol shall not demur for the nonage of the king, because the law always adjudges him of full age.

Roll. Abr. 142.

In an action brought by baron and feme for the inheritance of the feme, the parol shall not demur for the nonage of the baron, because in the right of the feme.

Roll. Abr. 142.

In a writ of *mesne* brought by baron and feme in right of the feme, the parol shall not demur for the nonage of the feme.

Roll. Abr. 142.

In *detinue* against an executor upon a delivery to the testator, the parol shall not demur for the nonage of the executor.

Roll. Abr. 142.

In an action of debt brought against baron and feme, upon an obligation of the ancestor of the feme, the parol shall demur for the nonage of the feme.

Roll. Abr. 142.

In a *præcipe quod reddat* against baron and feme of land that the feme had by descent, the parol shall demur for the nonage of the feme, though the baron be of full age.

Roll. Abr. 142.

(L) Privilege of Infancy as to Parol's demurring.

A feme received for default of her husband shall have her age, though the baron was of full age.

Roll. Abr. 142.

5. *In respect to what Estate or Interest the Parol shall demur.*

If an infant be in by (*a*) purchase, he shall not have his age.

Carter, 88; Roll. Abr. 143. (*a*) If an infant be in by abatement, and not by descent, he shall not have his age. Roll. Abr. 143.——But, if the heir of the disseisee enters, he shall have his age. Roll. Abr. 144.——So, if the tenancy escheats to an infant, who is in by descent in the seignory, he shall have his age. Keilw. 105.

As, if there be a lease for life, the remainder to the right heirs of J S, who is dead at the time, his heir within age, he shall not have his age when he comes in by *aid prayer*, for he hath it by purchase.

Roll. Abr. 143.

If an infant hath an estate in possession by purchase sufficient to answer the action, though he hath the residue of the estate by descent, he shall not have his age.

Roll. Abr. 143.

As, if the father and son and heir purchase to them and the heirs of the father, and after the father dies, and a real action is brought against the son, he shall not have his age, although he hath the remainder in fee by descent.

Roll. Abr. 143.

If lessee for life (*b*) surrenders to an infant who hath the reversion by descent, he shall not have his age.

Roll. Abr. 143. (*b*) For *quoad* strangers the estate for life hath continuance. Co. Lit. 338 b.

If the father enfeoffs his son and heir in fee (*c*) with warranty, and dies, the son shall have his age, because the warranty is extinct, and therefore in lieu thereof he shall be adjudged (*d*) in by descent.

Roll. Abr. 143, 144. (*c*) So, if he be enfeoffed by his father without warranty; for he may elect to be in of the one estate or of the other. Roll. Abr. 144. (*d*) So, if tenant in tail enfeoffs his issue, and dies, the issue shall have his age, for he is remitted, and so in by descent. Roll. Abr. 144.

If an infant be enabled by custom to have and alien his land at a certain time, as at fifteen years of age, or when he can measure a yard of cloth, after this time, and before his full age of twenty-one, he shall have his age; for the custom being to be construed strictly, does not extend to this collateral thing.

Roll. Abr. 144.

In a *formedon in reverter*, if the demandant makes himself heir to the donor, as heir at common law, and the tenant claims, as younger son, as heir to the donor by the custom, and prays the parol to demur for his nonage, yet it shall not demur, because they both claim to be heir to the same person.

Roll. Abr. 143.

In a *nuper obiit* by the aunt against the niece, and a demand of the seisin of the father of the aunt, who was the grandfather of the tenant, the tenant, who is in by descent from her mother, shall not have her age, because they are one heir, and of equal condition as to privity of blood, where the common ancestor died last seised, as the case must be intended.

Roll. Abr. 143; 6 Co. 4 b, S. P. cited and said, for it is principally to try the privity of blood.

But, if land descend to A and B, coparceners, and they enter, and have

issue, and die seised, in a *nuper obiit* by one of the issue against the other within age, the parol shall demur for the nonage of the tenant, because their common ancestor did not die last seised.

Roll. Abr. 143.

If a devise be to the heir in tail, and if he die, &c., that another shall sell it, the devisee shall not have his age, because he hath the estate-tail by purchase.

Roll. Abr. 144.

If a gift be made to the father for life, the remainder in tail to the son, the remainder to the right heir of the father, and after the father die, and the fee descend upon the son within age, yet he shall not have his age, because he hath the estate-tail by purchase.

Roll. Abr. 144.

So, if a gift be made to the father for life, the remainder to a stranger in tail, the remainder to the son in tail, the remainder to the right heirs of the father, and after the stranger die without issue, and after the father die, and the fee descend upon the son within age, yet he shall not have his age, because he hath the tail by purchase.

Roll. Abr. 144.

If A, being tenant in tail, enfeoff B to the use of A and his wife for life, and after to the heirs of A, and A die, and the wife grant her estate to C, and his heirs, during the life of the wife, and C enter, and die, and the lands descend to his heir, against whom the issue in tail brings a *formedon*, the defendant shall not have his age, because he is in only as an occupant, and no estate of inheritance descended.

N. Bendl. 256, Waller v. Lamb, adjudged; And. 21, S. C., adjudged; Carter, 88, S. C. cited; Chaplin v. Chaplin, 3 P. Wms. 367.

6. *Where for the Nonage of the Vouchee.*

If an infant be (*a*) vouched and bound to warranty by the deed of his ancestor, the parol shall demur for the nonage of the infant.

Roll. Abr. 144. (*a*) When for the nonage of the vouchee in a writ of entry *sur disseisin*, notwithstanding the statute of Westminster 1, c. 46; vide 2 Inst. 257; Dyer, 137.

If two coparceners in gavelkind are vouched as one heir, the parol shall demur for the nonage of the youngest, if he be seised; yet he is vouched but for his possession.

Roll. Abr. 144.

So, if one coparcener be vouched, and have aid of the other coparcener, who is within age, the parol ought to demur.

Roll. Abr. 144.

If a feme tenant in dower vouches the heir of her husband, and the husband of the heir, the parol shall not demur for the nonage of the (*b*) baron, the wife being of full age, because the baron is vouched only for the inheritance of the feme.

Roll. Abr. 144. (*b*) But the parol ought to have demurred, if both had been within age or the feme only. Roll. Abr. 144, 145.

If the youngest son enter into the inheritance descended, the parol shall not demur for his nonage, if he be vouched as heir within age, if the eldest son be of full age, who is heir in right, because he cannot be heir by continuance.

Roll. Abr. 145.

(L) Privilege of Infancy as to Parol's demurring.

If a bastard be vouched within age by reason of his possession, the parol shall demur for his nonage, because he may be heir by continuance all his life, without claim to the contrary.

Roll. Abr. 145; Co. Lit. 244; 8 Co. 101.

If an infant be vouched by lessee for life, by reason of the reversion, which he hath by descent, the parol shall demur, although he hath not the freehold by descent.

Roll. Abr. 145.

At common law if the husband had aliened the lands of his wife, with warranty, and died, and in a *cui in vita* by the wife, or a *sur cui in vita* by the heir of the wife, the alienee had vouched the heir of the husband within age, the parol should have demurred till the full age of the vouchee.

2 Inst. 455.

But by the statute of (*a*) Westm. 2, c. 40, it is enacted, that if the husband aliens the right of his wife, (*b*) the suit of her or her heir, after the death of her husband, shall not be delayed by the nonage of the heir (*c*) that ought to warrant, but the (*d*) (*e*) purchaser shall (*g*) tarry till the age of his warrantor to have his (*h*) warranty.

(*a*) 13 E. 1, c. 40. But since the 32 H. 8, c. 28, (by which an entry is given to the wife or her heir after an alienation by her husband,) this act is of little use. 2 Inst. 456. (*b*) Extends only to a *cui* or *sur cur in vita*, which are the proper actions upon an alienation by the husband; for if the wife is tenant in tail, and the baron aliens, and dies, and she dies, her issue cannot have a *sur cui in vita*, but a *formedon*, in which the purchaser may vouch the heir of the baron, and for his nonage the parol shall demur. 2 Inst. 445. (*c*) So that it extends only to the heir of the baron that aliened. 2 Inst. 445. (*d*) Intended only of *ipse emptor*, not his heir. 2 Inst. 456.—So of the immediate purchaser, and not his alienee, though he may vouch the heir of the baron as assignee. 2 Inst. 455; 4 Co. 50 a.——So, intended only where the purchaser is tenant in deed, not where he comes in as vouchee or tenant by receipt, and vouches the heir, &c. 2 Leon. 148; 1 Co. 15 a; 4 Co. 50 a. (*e*) Of any estate of freehold. 2 Inst. 546. (*g*) When he shall have a resummons. 2 Inst. 456. (*h*) Whether in law or deed. 2 Inst. 456.

7. *Where for the Nonage of the* Prayee in Aid.

If in (*i*) action against tenant by the curtesy he prays (*k*) in aid of the heir within age, the parol shall demur.

Roll. Abr. 145. (*i*) But, if error is brought against tenant by the curtesy, the parol shall not demur for the nonage of him in reversion, *per* Roll. Rep. 251, said by Houghton *arguendo, quod* Coke *concessit*, because he is not tenant. (*k*) Where for the non age of the *prayee in aid* and tenant by *receipt* in a writ of entry, notwithstanding the statute of Westm. 1, c. 46; and vide Inst. 257; Dyer, 137; 2 Leon. 148.

If lessee for life hath aid of him in (*l*) remainder within age, who is in by descent, the parol shall demur; *secùs*, if he were in by purchase.

Roll. Abr. 145. (*l*) So, if lessee for life hath aid of him in reversion by descent.

If there be lessee for life, the remainder to the right heirs of J S, who is dead, and after the right heir die, his heir within age, and the lessee have aid of him, the parol ought to demur, for he is in by descent.

Roll. Abr. 145.

So, if J S, at his death hath two daughters his heirs, and after the one dies, and her part descends to her daughter within age, the parol ought to demur for her nonage, though the aunt is in by purchase.

Roll. Abr. 145.

In an annuity against a parson, if he hath aid of the ordinary and patron

within age, yet the parol shall not demur for the nonage of the patron; for the charge lies not upon the patron, but upon the parson.

Roll. Abr. 145; Roll. Rep. 323, S. C. cited.

If two in reversion by descent are received upon default of the lessee, and the one is within age, the parol shall demur.

Roll. Abr. 145.

If a feme in by descent be received for default of her husband, the parol shall demur for her nonage, though the (*a*) statute be *parata petenti respondere.*

2 Inst. 342. (*a*) Viz. 13 E. 1, c. 3, which vide explained, 2 Inst. 341.

In avowry for a rent-charge reserved upon a purparty, if the plaintiff lessee for life hath aid of him in the reversion within age, who is in by descent in the reversion, yet the parol shall not demur because the land is not in demand.

Roll. Abr. 145, 146.

8. *In what Cases if the Parol demur against one it shall against another.*

If two are vouched, if the parol demurs for the nonage of one, it shall for the other also.

45 E. 3, 23; Roll. Abr. 146.

If aid is prayed of two coparceners, viz. the aunt and the niece, and the aunt hath the remainder by purchase, and the niece is within age, and hath the remainder by descent, the parol shall demur for both.

Roll. Abr. 146.

So, if aid be prayed by one coparcener of two other coparceners, of which one is within age, and the other of full age, the parol shall demur for all.

Roll. Abr. 146.

If the tenant vouch himself and J S, as heirs, and J S is within age, the parol shall demur for both.

Roll. Abr. 146.

In a (*b*) *dum fait infra ætatem* by two coparceners of the seisin of their ancestor, for the nonage of one demandant the whole parol ought to demur.

Roll. Abr. 146. (*b*) So, in a *non compos mentis* by two coparceners of a seisin of their ancestor, the parol shall demur for both for the nonage of one. Roll. Abr. 146.

In a writ of entry *sur disseisin* by two coparceners, of which one is within age, *qui non prosequitur* upon the summons, yet the parol shall demur against the other also.

Roll. Abr. 147.

If a writ of error be brought against the heir of the recoverer within age, and a *scire facias* against the tertenant, if the parol demur for the heir, yet it shall not demur as to the tertenant; for the heir shall not be at any prejudice, if it is reversed as to the tertenant.

Roll. Abr. 147.

If four enter into (*c*) a recognisance, and after one die, his heir within age, in a *scire facias* against the heir and the rest, the parol shall demur against all.

Roll. Abr. 147; 3 Co. 13 a. (*c*) So, where two are bound in a statute, and one dies, his heir being within age. Hetl. 59; Lit. Rep. 72.

In a *scire facias* against the tertenants to have execution of damages

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recovered against J S, if the parol demurs against one of the tertenants for his nonage, it shall demur against all.

Roll. Abr. 147.

In a *scire facias*, if two coparceners are received upon the default of the lessee, and the parol demurs for the nonage of one of the coparceners, it shall demur for both.

Co. Lit. 146 a; 3 Co. 13 a.

If in debt upon an obligation against B and C sons and heirs of the obligor, and against D the daughter and heir of A who was another of the sons and heirs of the obligor in gavelkind, process is continued till the uncles are outlawed, and the niece waived, and after the uncles are pardoned, and bring a *scire facias* against the plaintiff, who thereupon declares against them *simul cum* the niece, and the uncles plead their niece is but of the age of seven, *unde non intendunt quod durante minori ætate suâ* they ought to answer, &c., yet the parol shall not demur; for the niece is out of court, and *quoad* her the original is determined, and at her full age no re-summons could be sued against her, but the uncles only, because she never appeared in court.

Dyer, 239; Hawtry v. Anger, N. Bendl. 148; Moore, 74; And. 10, S. C. adjudged.

9. *In what Cases the Demurrer of the Parol for Part shall be for all.*

In a writ of error upon a judgment for divers things against an infant upon a recovery by his ancestor, if the infant disclaims for part, by which the judgment is to be reversed for error therein, yet for the nonage of the infant the parol shall demur for the rest, and this shall make the parol to demur also for that in which the infant hath disclaimed, because it is but one record; and therefore if he hath his age as to part, he shall have it for the whole.

47 Ass. 4; Roll. Abr. 147.

The same law in an action against an infant, if he acknowledges the action of the demandant for part, (*a*) yet, if the parol demurs for the rest, it shall demur for all.

Roll. Abr. 147. (*a*) In a *precipe quod reddat* the tenant may confess the action for part, and pray his age for the rest. Bro. *Age*, 9.

If an infant brings a writ of (*b*) entry *sur disseisin* to his father, and the tenant pleads the release of the father as to part of the land in demand, by which the parol is to demur for this, yet it shall not demur for the rest.

Roll. Abr. 147. (*b*) In a writ of entry *sur disseisin* in the *per*, age is taken away by Westm. 2, c. 47; which vide 2 Inst. 256.

In an (*c*) assize by three coparceners, if the tenant claims as tenant by the curtesy of the whole, and prays in aid of one of the plaintiffs in reversion within age, and hath aid of him, by which the parol ought to demur for the third part that belongs to the infant, and not for the rest; yet because the assize shall not be taken by parcels, it shall demur for the whole.

Roll. Abr. 147. (*c*) This must be intended of an assize of *mort d'ancestor;* for in an assize of *novel disseisin*, even at common law the parol should not have demurred. Roll. Abr. 141.

10. *Of the Prayer of Age and Counterplea.*

The granting that the parol shall demur in judgment of law is in favour of the infant, therefore the court *ex officio* ought to grant it, though the tenant will answer.

6 Co. 5 a.

(L) Privilege of Infancy as to Parol's demurring.

Where age is granted, or the parol demurs, the writ does not abate; but the plea is put without day until full age, at which time there shall be a re-summons.

2 Inst. 258; Rast. Ent. 360.

In a *formedon* if the tenant vouches J S as cousin and heir of, &c., and for his nonage prays that the parol may demur, he ought to show how he is cousin.

Dyer, 79.

If in dower the tenant vouches one within age, in favour thereof, he ought to show a deed.

6 Co. 5 a.

If a man hath aid of an infant, and of the king, because the infant is in ward to him, after a *procedendo* the parol shall not demur upon demand for the nonage of the ward; though this ought to have been granted, if he had demanded it at the time of the *aid prayer;* for the *procedendo* commands the justices to proceed, and he ought to have shown this in Chancery to stay the *procedendo.*

Roll. Abr. 146; 4 Leon. 201; Dyer, 256, pl. 4; N. Bendl. 118, pl. 151.

A counterplea of age is like an estoppel, and therefore ought to be very plain and certain to every intent.

3 Bulstr. 144.

If a man says in an action (in which age lies) that his ancestor was seised in fee, and died seised, and this descended to him within age, and prays his age, (*a*) it is a good counterplea (*b*) that his ancestor did not die seised.

Roll. Abr. 146. (*a*) That he is a bastard, hath an elder brother, or that his father was attainted, &c. Dyer, 137, pl. 26; 3 Bulstr. 144; vide, and the several authorities there cited; and see Roll. Rep. 325; and the books there cited. Cro. Jac. 393. (*b*) In a like case the demandant traverses the descent, and day given the tenant to advise what to do. Hob. 226.

If an infant upon default of the tenant prays to be received, because the tenant is tenant by the curtesy after the death of his mother, the reversion to him by descent as heir to his mother, and prays the parol may demur, it is a good counterplea of the age, that the land was given to the mother and her first husband in special tail, and the husband died without issue, and she took the tenant for her second husband, so the second husband in by abatement.

32 E. 3, 55; Roll. Abr. 146.

In a writ of error out of the Common Pleas the only question was, whether upon a plea by the defendant to have the parol demur, (issue being joined by the infant that sued by his guardian, and it being tried, and found against the infant,) a peremptory judgment should be given against him, or only a *respondeas ouster:* it had been argued and much laboured in C. B., that it should be only a *respondeas ouster;* but after great debate, they held the law to be manifestly clear, that every dilatory plea that receives its trial by the country shall be peremptory, let it be of what nature soever, though this case was a case of as much compassion as could be, and the court would have shown the infant any lawful favour. And of the same opinion was the Court of B. R. upon the writ of error.

Amcotts v. Amcotts, Sid. 252; Lev. 163; Raym. 118; Keb. 869, 900, S. C. adjudged.

β(M) Miscellaneous Points.

An infant is allowed twenty years after he arrives at age, to file his bill for redemption of a mortgage.

Lamar v. Jones, 3 Har. & M'Hen. 328.

Infants are bound by judgments rendered under the superintendence and protection of the court.

Britton v. Williams, 6 Munf. 453; Broussard v. Barnard, 7 Lo. Rep. 223; Young v. Whitaker, 1 Marsh. 399.

In general a father is entitled to the custody of his children, (*a*) but for valid reasons, they may be intrusted to the mother in preference, (*b*) or to third persons.(*c*)

(*a*) Comm. v. Nutt, 1 P. A. Bro. 143; Comm. v. Addicks, 2 S. & R. 174; United States v. Bainbridge, 1 Mason, 78. (*b*) 2 S. & R. 174. (*c*) 1 P. A. Bro. 143.

When land is devised to be sold, and the proceeds paid to an infant, the infant has the election to take the land or the money; and, if the guardian sell the land, and the sale does not appear to be advantageous to the infant, a court of equity can elect for him, and bind him by such election.

Turner v. Street, 2 Rand. 204.

An infant whose father is dead, and whose mother is again married, is entitled to his own earnings, and may maintain an action to recover them.

Freto v. Brown, 4 Mass. 675.

An infant cannot be naturalized on his own petition.

Le Forestier's case, 2 Mass. 419.

An infant may, for a valuable consideration, endorse a negotiable promissory note, or bill of exchange, so as to transfer the property to an endorsee.

Nightingale v. Withington, 15 Mass. 273.

Where the infant's income was 1,500*l.* per annum, the court made an order of allowance for maintenance of 450*l.* per annum.

Christie, in re, 9 Sim. 643.*g*

INFORMATIONS.

(A) Of the Nature and several Kinds of Informations.
(B) In what Cases they lie.
(C) In what Manner they are to be laid.
(D) Of filing an Information, the Proceedings thereon, and the Provisions made herein by Statute.
β (E) Of Informations under the Laws of the United States.
§ 1. *In What Court Informations will lie.*
2. *For what Offences Informations will lie.*
3. *Of the Form of an Information.*
4. *Of the Rights of the Informer.g*

(A) Of the Nature and several Kinds of Informations.

An information may be defined an accusation or complaint exhibited against a person for some criminal offence, (*d*) either immediately against

the king, or against a private person, which, from its enormity or dangerous tendency, the public good requires should be restrained and punished, and differs principally from an indictment in this, that an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it.

(*d*) The offence must be merely a misdemeanor; not treason, or felony, or misprision of treason.—"An information is for the king that which for a common person is called a declaration." Termes de la Ley, voc. *Information.* Or, as Lord C. B. Comyns has it, referring to the same book. "An information is a declaration of the charge or offence against any one at the suit of the king." Com. Dig. tit. *Information* (A). *β* An information *qui tam* is in the nature of a civil suit. United States v. Le Vengeur, cited 2 Dall. 367; Ketland v. The Cassius, 2 Dall. 365.*g*

This difference between informations and indictments has made (*a*) some men conceive, that this kind of proceeding was utterly unlawful, as being not only contrary to the original frame and nature of our laws, but also contrary to (*b*) *Magna Charta*, and several other statutes, which require that no man be put to answer, &c., but upon indictment or presentment.

(*a*) *β* An information resembles not only an indictment, in the correct and technical description of the offence, but also an action *qui tam.* Commonwealth v. Messenger. 4 Mass. 465.*g* Vide Sir Francis Winnington's argument, 5 Mod. 459; Sir B. Shower's arguments in 1 Show. Rep. where all that council offered on each side of the question may be found. Shower thoroughly examines the subject. Winnington treats it popularly. In 2 Hawk. P. C. it is said to have been holden, that the king shall put no one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself; for which is cited Thel. b. 1, c. 3, § 9, 10, &c.; Finch. 336; Fitz. *Action sur le case,* &c.——Also, from the abuses made of them, they have been complained of as unlawful, as particularly in the reign of H. 7, when by force of a statute made in the 11th year of that reign, which empowered justices of assize and peace to proceed on all penal statutes by information, they were made use of by Empson and Dudley to the great oppression of the people: but this statute was repealed by 1 H. 8, c. 6. 2 Hal. Hist. c. 20. ‖ It is well observed by Sir Bartholomew Shower, in his excellent argument above alluded to in support of the legality of informations, 1 Show. Rep. 123, that, "the prosecution by information was not the thing complained of by this law of H. 7, but the determining by discretion, and not *secundum legem et consuetudinem Angliæ;* and my Lord Coke complains there was no trial by jury. Empson and Dudley's crimes were, the inflicting penalties under the particular statutes, never intended, and procuring false informations, and undue offices, and refusing to admit traverses where by law they ought. These were their crimes, as appears by the indictment against them in 4 Inst. 198." As this statute of 11 H. 7, is not now to be found in the common editions of the statutes, I shall insert it from the *authentic edition,* as also the statute of 1 H. 8, c. 6, which repealed it. By st. 11 H. 7, c. 3, "The king our sovereign lord calling to his remembrance that many good statutes and ordinances be made for the punishment of riots, unlawful assemblies, retainders, and giving and receiving of levies, signs, and tokens unlawfully, extortions, maintenances, imbracery, excessive taking of wages, contrary to the statutes of labourers and artificers, the use of unlawful games, inordinate apparel, and many other great enormities and offences which be committed and done daily, contrary to the good statutes, for many and divers behoveful considerations severally made and ordained, to the high displeasure of Almighty God, and the great let of the common weal of this land, notwithstanding that generally by the justices of the peace in every shire within this realm, in the open sessions, is given in charge to inquire of many offences committed contrary to divers of the said statutes, and divers inquests thereupon, there strictly sworn and charged before the said justices to inquire of the premises, and therein to present the truth, which are letted to be found by imbracery, maintenance, corruption, and favour, by occasion whereof the said statutes be nor cannot be put in due execution; for reformation whereof for so much that before this time the said offences, extortions, contempts, and other the premises, might not, nor as yet may be conveniently punished by the due order of the law, except it were first found and presented by the verdict of twelve men, thereto duly sworn, which for the causes afore rehearsed, will not find, nor present the truth: Wherefore be it by the advice and assent of the lords spiritual and temporal, and the commons in this present parliament as-

sembled, and by authority of the same, enacted, ordained, and established, that from henceforth, as well the justices of assize in the open sessions, to be holden afore them [and every of them] as the justices of the peace in every county of the said realm, upon information for the king tofore them to be made, have full power and authority by their discretion, to hear and determine all offences and contempts, committed and done by any person or persons, against the form, ordinance, and effect of any statute made, and not repealed. And that the said justices upon the said information, have full power and authority to award and make like process against the said offenders, and every of them, as they should, or might make against such person or persons, as be presented and indicted before them, of trespass done contrary to the king's peace; and the said offender and offenders duly to punish according to the purport, form, and effect of the said statutes.

"And also be it enacted by the said authority, that the person which shall give the said information for the king, shall by the discretion of the said justices content and pay, to the said person or persons against whom the said information shall be so given, his reasonable costs and damages in that behalf sustained, if it be tried or found against him that so giveth or maketh any such information.

"Provided always, that any such information extend not to treason, murder, or felony, nor to any other offence, wherefore any person shall lose life or member, nor to lose by nor upon the same information, any lands, tenements, goods, nor chattels, to the party making the same information. Provided also, that the said information shall not extend to any person dwelling in another shire than there as the said information shall be given or made. Saving to every person and persons, cities, and towns, all their liberties and franchises, to them, and every of them, of right belonging, and appertaining."

The statute 1 H. 8, c. 6, after reciting the above statute of 11 H. 7, *verbatim*, proceeds, "forasmuch as by force of the same act, it is manifestly known, that many sinister and craftily feigned and forged informations have been pursued against divers of the king's subjects, to their great damage and wrongful vexation: Be it therefore enacted, ordained, and established by the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that the act, &c., before rehearsed, made the said eleventh year, and every thing therein comprised, be from henceforth of none effect, void, anyntyshed and repealed."‖ (*b*) C. 29 and 5 E. 3, c. 29; 25 E. 3, st. 5, c. 4; 28 E. 3, c. 3, and 42 E. 3, c. 3. [But in the very same act of parliament, which abolished the court of star-chamber, viz. 16 Car. 1, c. 10, § 6, a conviction by information is expressly reckoned up, as one of the legal modes of convicting such persons as should offend a third time against the provisions of that statute. 4 Bl. Comm. 311.]

But though, as my Lord Hale observes, in all criminal causes the most regular and safe way, and most consonant to the statute of *Magna Charta*, &c., is by presentment or indictment of twelve sworn men, yet he admits that for crimes (*a*) inferior to capital ones, the proceedings may be by information. And this, from the (*b*) long and frequent practice, is now certainly established as part of the law of the land; and therefore, at this day, the following kinds of informations may be exhibited, wherever the nature of the offence deserves such a proceeding.

2 Hal. Hist. P. C. c. 20. (*a*) But no information will lie for a capital crime, or for misprision of treason. 2 Hawk. P. C. c. 26, § 3; 2 Hal. Hist. P. C. c. 20. ‖ But see 5 Geo. 2, c. 30, concerning bankrupts, who may be convicted upon indictment, or *information*, and suffer as felons, without benefit of clergy. These words, "indictment, or information," occur in the preceding statutes of 4 & 5 Ann. and 5 Geo. 1, but there has been no instance of trial in this case upon information. No doubt, the word "information" originally slipped in from inadvertency. However, the offence is now not capital. See 1 G. 4, c. 115.‖ (*b*) That informations were at common law, 5 Mod. 463, *per* Holt, C. J., and *totam Curiam*.—And vide Show. 106, &c.

1st, For an offence principally and more immediately against the king an information may be exhibited in the name of the king's attorney-general,(*c*) and such information may be filed without any application or leave (*d*) of the court, and the party shall be obliged to answer the same. Also the statute 4 & 5 W. & M. c. 18, which requires a recognisance for payment of costs from persons exhibiting and prosecuting informations, does

not extend to informations filed by the king's attorney-general. (*e*) And it is (*g*) said, that the court will not quash such information on motion, but will oblige the party to demur or plead thereto.

2 Hawk. P. C. c. 26, and vide Carth. 465, 466, that no such information can be brought on a penal statute, for any offence for which a common informer might have an information before justices of assize, nisi prius, jail-delivery, oyer and terminer, or justices of peace, at the quarter sessions. [(*c*) It may be exhibited by the solicitor-general during the vacancy of the office of attorney-general; and that, without suggesting such vacancy on the record. R. v. Wilkes, 4 Burr. 2555.] ‖ This subject is particularly considered in a manuscript treatise on the star-chamber, by W. Hudson, of Gray's Inn, Esq. in the British Museum, vol. 1, No. 1226, and as there is much curious matter in it, the whole section referred to is given below.* (*d*) The court indeed will never grant an information at the instance of the attorney-general, on the behalf of the crown; for if it is proper, he may exhibit the information himself; if it is not proper, he ought not to ask the court to do it. Besides, if he has any doubt of the propriety of it, he may satisfy himself by summoning the parties to show cause, why it should not be exhibited. R. v. Philips, 3 Burr. 1564; 4 Burr. 2090. (*e*) These informations are personally the king's prosecutions; no man is here to be considered in the light of a promoter, or private prosecutor. 1 Bl. Rep. 514.‖ (*g*) Salk. 372; Ld. Raym. 370. *Contr.* Fountain's case, 1 Sid. 152. But see R. v. Nixon, 1 Str. 185.

2dly, On application, and leave of the court, grounded on motion and affidavit of some misdemeanor, which, if true, doth from its evil tendency merit such prosecution, the court allows of the filing of an information in the name of the master of the crown-office; and of such kind of informations there are numberless precedents in the crown-office.

2 Hawk. P. C. c. 26, § 6; 2 Hal. Hist. P. C. c. 20.

‖ * Part iii. § 4. "I have handled the particular persons which exhibit suits in this court: it remaineth that I should in the next place treat of the king's ordinary suits, which are of two sorts; either by his attorney informing of himself, or by other men's relation; and the king's almoner;† the one being in criminal causes, the other in civil.

"For the king's attorney, I have known it much questioned, whether any other of the king's counsel may not inform for the king, as well as the attorney-general. And it is true, that in 8 Hen. 8, it is ordered, that the king's solicitor should not prosecute any further the merchants of the Stilliards, till it were otherwise ordered by the council. And in the same term the solicitor was commanded to sue out process against some which acquitted one Blaze of a tax. So that it seemeth that others of the king's counsel did prosecute causes for the king, as well as the king's attorney. But in the 1 & 2 Jac. it was resolved by the court, that it belonged to the place of the attorney; and Serjeant Hele, the king's serjeant, putting in a bill against Sir John Luson, was denied that privilege, for if a bill be put in by the king's counsel as for the king, there are no costs to be paid to the defendants, nor fee for the prosecution. But in this case Serjeant Hele's bill was dismissed with 30*l.* costs, it continuing in prosecution not above two terms. But because that the king's causes are of great weight and labour to the clerks, and in all other causes the defendants pay the plaintiff his costs, the Lord Keeper Egerton, Hil. 44 Eliz., made an order in the cause where the king's attorney was plaintiff against Harwoode and Tookey, that the defendants, which were sentenced at the king's suit, should always pay costs to satisfy the clerks which were for the king all their duties and fees; a fit order to be continued, but the same hath not been of late used; for in the great Dutch cause the king distributed a great sum of money amongst the clerks, in recompense of their fees and travail.

"But, if the defendants be acquitted, they can have no costs in ordinary course. But, if it appear that the king's attorney prosecuted the cause by another man's relation, the lord keeper may and will tax costs to the defendants, which are dismissed, upon apparent manifestation, that the same was by a certain person prosecuted, and that he laid out any money in it. For in 1 Hen. VIII., the lord mayor of London was compelled to pay the costs of some Kentish men against whom he had given intimation to the king's counsel for engrossing of corn.

† See West's Symbol. 345, a bill by the bishop of Rochester, as king's almoner, for detaining the goods of a *felo de se* forfeited to the crown.

3dly, Where by many penal statutes the prosecution upon them is by the acts themselves limited to be by bill, plaint, information, or indictment, there, without doubt, the prosecution may be by information as well as by any other of these methods. Also, of common right, such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless any methods of proceeding be particularly appointed, by which all others are impliedly excluded.

But for this, vide tit. *Actions qui tam*, or *Actions on Penal Statutes*. [But, if a statute be merely prohibitory, it will be no ground for an information, though in such case an indictment may lie. Crofton's case, 1 Ventr. 63.]

4thly, Informations in nature of (*a*) a *quo warranto* may be, and frequently are, exhibited, with leave of the court, for usurping privileges, franchises, &c., which in some respects is (*b*) a civil suit, as it is used as

"And so did the Lord Egerton against Sir John Spenser, of London, although Sir E. Cooke opposed it with all his power, and the costs were paid. But, if there be a relator entered upon record, he shall pay all costs, yea, and damages, as another man; but no man ought to have costs, unless he be a relator upon record; for surely the Lord Houghton ought not to have paid costs to Sir E. Cooke, before he was entered a relator: only he may have damages, if the king's attorney inform for any outrage, or some particular man be found to be much wronged, the court may give him damages, although he be no party in court, as it was adjudged in the clerk of the markets' cause, who was ordered to make restitution to all those from whom he had extorted.

"And such as relate suits to the king's attorney, have this advantage, that they are not tied to any strict rule of prosecution, but only to the order which the court shall take, or the lord keeper.

"A great question hath been stirred, whether the king's attorney may prosecute a cause *virtute officii*, although the court dismiss it. And such a one was not long since prosecuted by the relation of one Vaughan against Sherwell. But surely the defendants were thereby wronged, and the court something dishonoured; for by the case before cited, Porte, solicitor to Hen. VIII. was ordered to surcease the suits against the merchants of the Stilliards; and there is no reason but he being a party should be ordered by the judges, and concluded by their order, as well in points of prosecution as in the sentence of final judgment.

"And although it be a positive rule, that any man may inform for the king in the star-chamber, yet in some cases a private person shall not prosecute, but the king's attorney. As, about 13 Jac. a private person put in an information against some merchants in London, who had the charge of the lottery for Virginia, upon discovery of a notorious deceit in purloining all the great lots. Although this were held a marvellous great deceit to the public, yet it was not thought fit that a private person should inform for this, it being matter of state, which might trench to the overthrow of that plantation. And so if scandal be of the public justice, every man may not inform for it, for that it may sometimes be made more prejudicial to the state by the scandal, than the example will do good, as it was adjudged in Mr. Strowde's case. But surely it was a great inconvenience, when the king's attorney denied any man to inform for the king, and enforced them to repair unto himself, which if it should have allowance, would be a means to smother many offences in the kingdom, which by information (although out of malice) come to light; for the king's attorney's prosecution is but sudden, *flagranti crimine*, as in a time of dearth, to punish a few engrossers of corn; in the time of the levellers' rising, to punish a few inclosers of commons. But the great offence wearing old, then it is either forgotten, or by intercession closed up, that it venteth no more in the public, for the example in few giveth satisfaction to the multitude, and the end of punishment is held to be, *ut pœna ad paucos, metus ad omnes perveniat.* But let me be understood, when I say, that the king's attorney is not tied to the strict rules of prosecution, for that is only to strictness of time for saving men's dismission; for he must make a good bill in matter and form as a common person, he must join an issue, give convenient time for examination of witnesses as a common person, the denial and restraint whereof was no small scandal to the justice of the kingdom in the Dutch cause; he must give warning for the hearing; and make as pregnant, manifest, and direct proof as any common person whatsoever."‖

a proper means to try a right, though it punishes the misdemeanor, such as the usurpation, &c.

|| Informations in the nature of a *quo warranto*, are of late institution. They are said to have come in on the cessation of the eyres, the end and design of which they were formed to answer; but there is no precedent of them in the old entries, or in Rastal. *Quo warrantos* having been originally returnable only in the Court of King's Bench, that court upon the discontinuance of the eyre revived its jurisdiction in its present shape. For being *custos morum* of the nation, and the usurpation being a crime, it grafted the inquiry of *quo warranto* upon this criminal jurisdiction. Gilb. Ca. 153; 1 Bl. Rep. 94. And yet the old writ of *quo warranto* was a civil writ at the suit of the crown; and not a criminal prosecution. 3 Burr. 1817.|| (*a*) For the writ of *quo warranto*, and how it differs from an information in nature of a *quo warranto*, vide 2 Inst. 282, 495; Latch. 46; Sid. 86; Old N. B. 107; Cro. Jac. 259; 1 Buls. 54; Cro. Car. 311.—Of the process on such information, Carth. 503; Ld. Raym. 426; Salk. 55; Comb. 19; Salk. 374, 376.——For the judgment thereon, Palm. 1, 2; 2 Roll. Rep. 113; Cro. Jac. 260; Salk. 374; 4 Mod. 55, 58; Carth. 218; 1 Burr. 402. (*b*) And being a kind of civil proceeding, there ought to be no great fine set on the party.|| Whether this be a criminal or civil suit has been much controverted. In the case of R. v. Bennett, mayor of Shaftsbury, Tr. 4 G. 1, the twelve judges were equally divided upon this question; and, what is very remarkable, two upon each bench were of different opinions; Parker, Bury, Powys, Blencour, Dormer, and Fortescue, that it was criminal; King, Tracy, Price, Eyre, Pratt and Montague, that it was not. Parker's Rep. 10, 11. It would seem now to be considered in general as a civil suit. R. v. Francis, 2 T. R. 484, the act of 9 Ann. considers it only as such; though if the case disclose no more than a misdemeanor, it will be criminal. R. v. Williams, 1 Bl. Rep. 93. For an account of the transactions upon the writs of *quo warranto* in the time of E. 1, and the instrument by which they were authorized, see Mr. Illingworth's Preface to the Hundred Rolls, lately printed under the commision of public records; and from whence the measure was immediately taken, see Mr. Luders's Treatise on the Constitution of Parliament in the reign of E. 1, c. 1.

(B) In what Cases an Information will lie.

HERE we shall lay down what hath been collected by Serjeant Hawkins. It is, as he says, every day's practice, agreeable to numberless precedents, viz. either in the name of the king's attorney-general, or of the master of the crown-office, to exhibit informations for batteries, cheats, seducing a young man or woman from their parents, (*a*) in order to marry them against their consent, or for any other wicked purpose, (*b*) spiriting away a child to the plantations; rescuing persons from legal arrests; perjuries, and subornations thereof; forgeries, conspiracies, (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, &c.; or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *tales*,) and other such like crimes, done principally to a private person, as well as for offences done principally to the king; as for libels, seditious words, riots, false news, extortions, nuisances, (as in not repairing highways, or obstructing them, or stopping a common river, &c.,) contempts, as in departing from the parliament without the king's license, (*c*) disobeying his writs, uttering money without his authority, escaping from legal imprisonment on a prosecution for a contempt, neglecting to keep watch and ward, abusing the king's commission to the oppression of the subject, making a return to a *mandamus* of matters known to be false; and in general any other offences against the public good, or against the first and obvious principles of justice and common honesty.

2 Hawk. P. C. c. 26, § 1, and several authorites there cited. (*a*) 2 Str. 1107, 1162; Andr. 310. (*b*) Skin. 47, S. P. [An information will lie for attempting to bribe a servant of the crown to procure an office under government, R. v. Vaughan, 4 Burr. 2494; for publishing an obscene book, R. v. Curl, 2 Str. 788; for blasphemy, R. v. Woolston; for procuring a man to marry a pauper in order to exonerate a parish,

(B) In what Cases an Information will lie.

R. v. Watson, 1 Wils. 41; R. v. Tarrant, 2 Burr. 2106; for an undue discharge of a debtor by judges of an inferior court, Moravia's case, Ca. temp. Hardw. 135; for a refusal by a captain of a ship to let the coroner come on board, R. v. Solgard, 2 Str. 1074; Andr. 231; for keeping great quantities of gunpowder as for a nuisance, R. v. Taylor, 2 Str. 1167; for maliciously impressing a captain, as a common seaman, R. v. Webb, 1 Bl. Rep. 19; for printing a ludicrous account of a marriage between an actress and a married man, R. v. Kinnersley, Ibid. 294; for an imposture and conspiracy, Ibid. 292; for procuring a female apprentice to be assigned, though with her own consent, for the purpose of prostitution, R. v. Delaval, Ibid. 439; 3 Burr. 1434; for seducing a woman, habituated to drinking, to make her will, R. v. Wright, 2 Burr. 1099; for bribing persons to vote at a corporation election, R. v. Plympton, 2 Ld. Raym. 1377. It will lie against a justice for any improper official conduct, as for demanding a shilling of a person brought before him for discharging his warrant, and committing the party for refusing to pay it, R. v. Jones, 1 Wils. 7; for voluntarily absenting himself from a sessions which could not be holden without him, R. v. Fox, 1 Str. 21; for corruptly discharging a person committed in execution by another magistrate, R. v. Brooke, 2 T. R. 190; for improperly granting as well as refusing a license, R. v. Holland, 1 T. R. 692. But the court will not proceed in this extraordinary way against a magistrate for a mere error of judgment, or a mistake of the law; if he has acted honestly and without any bad intention, R. v. Palmer, 2 Burr. 1162; R. v. Jackson, 1 T. R. 653; and will, in general, in such case discharge the rule with costs. R. v. Palmer, 2 Burr. 1162; R. v. Fielding, Ibid. 654. See also R. v. Eundem, Ibid. 722. And where application is made for an information against him for having improperly convicted a person, the party complaining must make an exculpatory affidavit, fully denying the charge. R. v. Webster, 5 T. R. 388.] || Though it seems, that the motion for an information against a magistrate may be made in the second term after the imputed offence, no assizes having intervened, R. v. Harries, 13 East, 270; yet it must be early enough to give him an opportunity of showing cause against it in that term, R. v. Marshall, Ibid. 322. In all cases there must be time enough for the magistrate to show cause against the application in the term in which it is made, unless the misconduct imputed to him be during the term. R. v. Smith, 7 T. R. 80. For the rule is not to hang over his head for a whole vacation, 2 Sty. Pr. Reg. 80. (*a*) *Qu.* whether the court has jurisdiction in this case; it would seem to be wholly parliamentary. See 4 Inst. 16, 17.|| *β*By the Constitution of the United States, Amendm. art. 5, no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger. See State v. Mitchell, 1 Bay, 267.*g*

An information was exhibited against D, an attorney of C. B., for speaking scandalous and reproachful words of Sir John Kay, knight of the shire for the county of York, and a justice of peace, &c., concerning his said office of justice of peace, and the exercising thereof. And upon demurrer to this information it was argued, that it would not lie for scandalous words spoken only of a particular person, because he might have an action on the case to recompense him in damages; though it was admitted, that such a proceeding might be warranted for libels, or for dispersing defamatory letters, because by such means the public peace might be disturbed, and discords fomented among neighbours, which might at last be a public injury, but that there was no such mischief in the present case. On the other side it was insisted, that this information was founded on sufficient matter, because this prosecution is not only as it respects the person of Sir John Kay, but it relates to him as he is a public magistrate, and one who is subordinate to the government, and therefore such defamatory words are a reproach to the supreme governor, by whom magistrates are intrusted, and from whom they derive their authority, and it will not be denied but that words reflecting on the public government are punishable at the suit of the king by information. And for this reason the court held that an information would lie, and thereupon gave judgment against the defendant, and fined him a hundred marks.

The King v. Darby, Carth. 14; Comb. 45, 65, S. C.; 3 Mod. 139, S. C. But

Gould, J., in citing this case in Reg v. Langley, 2 Ld. Raym. 1030, says, that the determination was contrary. ‖ Whether words spoken of a justice of the peace in his absence are indictable, see further, R. v. Revel, 1 Str. 420; R. v. Pocock, 2 Str. 1157; R. v. Wrightson, 11 Mod. 166; 2 Salk. 698, S. C.; R. v. Penny, 1 Ld. Raym. 153.‖ βA criminal information was refused for words spoken to a magistrate alleging that he wilfully absented himself from an election, calling him a liar, and threatening to repeat the charge whenever he met him, no intention appearing to provoke a breach of the peace. Chapman, ex parte, 4 Ad. & Ell. 773. See R. v. Byrne, 2 Nev. & P. 152; 6 Dowl. 37.γ

An information was exhibited by the attorney-general for conspiring to destroy the king's revenue of the excise: And whereas the king, by indenture, &c., *prolat.*, had farmed the excise of London, Middlesex, and Southwark, to A, B, and C, rendering 118,000*l. per ann.* monthly, &c., that the defendants, and others *ignot, &c., illicitè, factiosè, et seditiosè consultaverunt et conspiraverunt ad destruend. et depauperand. firmarios excisæ predict.*, &c., and many other facts were laid in the information tending to the destroying of the excisemen, depauperating them, destroying the king's revenue of excise, pulling down the excise-house, raising a tumult amongst the poor people, &c. But the jury that were to try the issue were unwilling to find this matter, though expressly proved, fearing it might be construed no less than treason, and so would only find that such and such of the defendants *illicitè, factiosè, et seditiosè, se assemblaverunt, et illicitè, factiosè, et seditioseè, consultaverunt, et conspiraverunt ad depauperand. firmarios dom. regis excisæ prædict. prout prædict. attornat. gen. dom. regis, &c., et quoad totam aliam materiam in informatione contentam* find them not guilty, and find J S not guilty generally. It was moved in arrest of judgment, that here is no offence at all found; for to conspire to depauperate the king's farmers is no offence, for it may be done by lawful means: and that they are laid to be the king's farmers is but a description of their persons, not that it was at the king's revenue of excise the conspiracy struck; and the *assemblaverunt* is not the charge, for then it ought to have been laid *riotosè et routosè*, but only leading to the conspiracy; for they must assemble before they can consult and conspire. It was answered by the king's counsel, that the *illicitè assemblaverunt* is an offence against the law, and as properly and fully laid as could be; for *riotosè* is where the assembly is with intent to commit a riot, and *routosè* for a rout; but an assembly may be illegal and punishable, and yet the intention of that assembling may be good, as 21 H. 7. Bro. tit. *Riots* 1, per Fineux; as, if men meet to prevent the breach of the peace between A and B. A going to market, and B threatening to beat him there. And to this assembly no properer epithet could be given than *illicitè*. But besides, all manner of combinations and confederacies are unlawful without respect to their end, 27 Ass. 44, Moore, 788, Lord Grey's case, and Cro. Ja. 37, the case of the Puritans petitioning; but this conspiracy, being to depauperate another man, is unlawful in its end. And to answer the objection that hath been made, it might be said, that although the depauperating of another man may be by lawful means, and the consequence of a lawful act, yet that is because it is not in the intention of the party, but it is *damnum absque injuriâ;* but for a number of men to design and conspire the depauperating of another cannot certainly be lawful, for there the damage to the third party is their only aim and end, and it is as well against the law of charity and common society. And this might be said, if there were nothing of the king's farmers in the case; but here the inducement to the whole charge in the information is, that the defendants, &c., *machinantes*

defraudare et deprivare dictam dom. regem de redditu suo prædict. et prædictos firmarios, &c., destruere et depauperare, did so and so. Now this inducement in the whole is applicable to every branch of the charge, and the jury having found those charges as they are laid, *scilicet modo et formâ prout*, &c., they have found, consequently, that it was done by the defendants, *machinantes*, &c., which makes it in their intention to strike at the king's revenue, as well as in consequence. It was also urged for the defendants, that for a bare conspiracy, without any act done in prosecution of it, no information would lie: But *curia cont.* for though there must be some fact to be as evidence of the conspiracy, as 9 Co., Poulter's case, yet it is the conspiracy that is the crime, and that being found, it is enough. It was also urged by the king's counsel, that the *modo et formâ prout* in the verdict extends to all the charges of fact that were done in prosecution of this conspiracy, and the acquittal *quoad tot. al. materiam*, &c., extends to the distinct charges of facts that have no relation to this conspiracy. But Windham, Justice, said, the *modo et forma prout* could by no means make the verdict comprehend other matter of fact than was expressly found. It was moved by the king's counsel, that they might inform the court of the heinousness of this conspiracy, and how it was proved to be upon evidence to the jury that tried it, to aggravate the offence, and induce the discretion of the court to increase the fine. And the case of Machin and Tully was cited, where a battery being found by *nisi prius* against them, the court informed themselves of the heinousness of it by affidavit, and thereupon vacated a fine that was set in a judge's chamber, and set a high fine upon the defendants. But the court refused it, saying, that were a way to let in those matters of which the jury has acquitted them, by suffering affidavits to be made, but in Machin's case the jury found the defendants guilty of the whole; and what needs aggravation of this, which appears so foul as it is found? The court after unanimously concurred, that judgment ought to be given for the king, though as to the offence found there was some variety of opinion. Windham distinguished betwixt a confederacy and a conspiracy, that for a conspiracy there ought to be some fact done in execution of it. So an indictment cannot be maintained against a man as a common thief, or champerter, or forestaller, without laying some fact of those offences. And in this he grounded himself upon 29 Ass. 45, but he held, that here the defendants are found guilty of a confederacy, which is not a word of art, but may be expressed in other terms, and such an offence will this matter found amount unto. He held the information as to the unlawful assembly not good, because it wanted *vi et armis*. As to all the subsequent facts, he held the defendants acquitted: and as to the intention of defrauding the king of the rent, &c., he held the acquittal did extend to it, because they were acquitted of the facts to which that was to be applied; but as to the confederacy, the verdict has found enough, and though it were to a private end it were unlawful; but here it is more, and that which will aggravate it highly; for the customers of the king are public persons, as the king's revenue is of a public concern, and it is set forth in the formation that these were farmers of a very great value. It is one thing to beat a private man, and another thing to beat a public officer, or the king's servant. If a man should strike the sheriff, who has the character of a public officer, it would be a high offence. Twisden held, that *vi et armis* was not necessary, and that they are found guilty of an unlawful assembly; and in that my lord chief justice concurred; as

also that the intention of defrauding and depriving the king of his said rent is implicitly found within the *modo et formâ prout*, &c., for so shall the *machinantes* &c., be applied. Twisden and Keeling concurred, that for a conspiracy alone without any prosecution, information lay; and Twisden said, a confederacy is a farther degree of a conspiracy; and they all agreed, that the king's revenue being concerned did highly aggravate the offence. 2 H. 4, 7, and 8 H. 5 b, were cited, that for maintenance, of that a monk should be able to contract, and *probi homines de Dale* should be a corporation. Lord chief justice cited old Magna Charta, where there is a statute against such as should undervalue lands in the king's hands. So judgment was given for the king; but the settling of the fine was respited, because they would consider as well *qualitatem delinquentis* as *quantitatem delicti*. In this case were cited 3 E. 3, 19; 43 Ass. pl. 38. Afterwards, the same term, Starling was fined 300 marks, and the rest of the brewers 100 marks apiece, but with some apology by the court for the smallness of the fine.

Hil. 15 & 16 Car. 2, in B. R.; R. v. Starling and other brewers of London; Lev. 125, S. C.; Sid. 174, S. C.; Keb. 650, 655, 675, 682, S. C.

β Where a criminal information for sending a challenge was applied for by a party who had himself sent one to a party to the same transaction; held not to be entitled, although the latter took place in a foreign country, and no breach of the peace contemplated where the application was made.

R. v. Larrien, 7 Ad. & Ell. 277.

Where a party applying for a criminal information for a libel in a newspaper, was shown, since the obtaining of the rule, to have published in other papers that the libel was scandalously false; held that the court would require the party applying for the protection of the court, to leave themselves wholly in the hands of the court, or not be entitled to the application; and rule refused.

Reg. v. Nottingham Journal Prop. 9 Dowl. 1042.

An information was granted against a justice of the peace for taking the recognisance of a person charged with an aggravated assault and battery, himself in 30*s*., and two sureties in 15*s*. each.

Respublica v. Burns, 1 Yeates, 370.

An information will not be granted against a sheriff for false swearing, in an affidavit annexed to a plea of recaption, on fresh pursuit, when an action is pending against him for the escape.

The People v. Dole, 1 Caines, R. 181.β

(C) In what Manner they are to be laid.

Regularly, the same certainty that is required in an indictment is in like manner required in an information; but it has been (*a*) holden not to be necessary to repeat the words *dat. cur. hic intelligi et informari* in the beginning of every distinct clause, if the want of them may be supplied by a natural and easy construction.

Vide tit. *Indictments*. (*a*) Salk. 375; 1 Ld. Raym. 527; 2 Hawk. P. C. c. 26, § 4.

In an information against Roberts, the ferryman over the river Mersey, which parts Anglesea from Carnarvonshire in Wales, it was laid generally, viz., that this was an ancient ferry time out of mind, and that 1*d*. was the usual rate for passage of a man and horse, 7*d*. for 20 cattle, 2*d*. for 20 sheep, &c., that Roberts being the common ferryman, between 7 *Septembris anno* 2 *&c.*, and the day of exhibiting this information, *injustè, oppressivè, et*

(C) In what Manner they are to be laid.

deceptivè cepit et extorsit de diversis ligeis et subditis domini regis ignotis to the attorney-general, passing that way, *diversas denariorum summas exceden. antiquam ratam et pretium pro passagio et transportatione suis et averiorum suorum, videlicet, pro passagio et transportatione cujuslibet personæ cum equo suo* 2*d. et pro quibuslibet* 20 *catallis us. et sic secund. ratam prædict. pro majori vel minori numero averiorum, &c.* The defendant was found guilty, and it was moved in arrest of judgment, that the information was *too general and uncertain*, because it did not allege that any particular person, or any certain number of cattle, were ferried over within the time laid in the information; neither did it mention any particular person from whom the extorted rates were taken, which it ought to do, that the single offence might certainly appear to the court; and after great deliberation *the whole court was of that opinion.* And *per* Holt, Ch. Justice, in every such information a single offence ought to be laid and ascertained, because every extortion from every particular person is a separate and distinct offence; and therefore they ought not to be accumulated under a general charge, as it is done in this case, because each offence requires a separate and distinct punishment, according to the quantity of the offence; and it is not possible for the court to proportion the fine or other punishment to it, unless it is singly and certainly laid.

The King v. Roberts, Carth. 226; 3 Salk. 198, S. C.; 4 Mod. 101, S. C.; 1 Show. 389, S. C.; Comb. 193, S. C.

β On an information by the crown for an intrusion, the venue cannot be laid in any county, nor the *venire facias* issued into a different county from that in which the venue is laid.

Attorney-General v. Lord Churchill, 9 Dowl. 772. But see Cutts v. Commonwealth, 2 Mass. 284.

In an information against a justice of the peace for bribery in the election of a clerk, it ought certainly to appear that an election was holden, and that at the election the vote was given.

Newell v. The Commonwealth, 2 Wash. 88. See Commonwealth v. Alexander, 4 Hen. & M. 522.*g*

An information resembles an action *qui tam*, and the informer must show the forfeiture and its appropriation.

Commonwealth v. Messenger, 4 Mass. 465.*g*

‖ In an information for postdating a draft, it is not necessary to set it out in the language in which it was originally drawn.

Attorney-General v. Valabreque, Wightw. 9.

Where an information on the statute 33 G. 3, c. 52, § 62, prohibiting officers of the East India Company residing in India from receiving presents, charged that the defendants being British subjects, on the 1st January, 1794, and from thence for a long time, to wit, until the 29th November, 1795, held certain offices under the company, and during all that time resided in the East Indies, and that whilst they held the said offices as aforesaid, and whilst they resided in the East Indies as aforesaid, to wit, on the 29th November, 1795, they received certain presents; it was held, that the context showed that the word *until* was to be taken inclusive of the 29th November, 1795, but, that if it had been incapable of receiving an *inclusive* construction, the words under the first *videlicet* "until the 29th of November, 1795," could not have been rejected as surplusage, for that can never be where the allegation is sensible and

consistent in the place where it occurs, and not repugnant to antecedent matter, though laid under a *videlicet*, and however inconsistent.

Rex v. Stevens, 5 East R. 244.

An introductory averment in an information that outrages had been committed in and in the neighbourhood of N is divisible, so that it need not be proved that they were committed in both places, and fourteen or fifteen miles from N may be considered in the neighbourhood.

Rex v. Salter, 4 Maule & S. 532.

An information on 51 G. 3, c. 87, (prohibiting brewers from receiving certain articles,) charging a receiving and taking into possession, is not maintainable where it is proved that the act of receiving was antecedent to the statute, though the possession had continued ever since.

Attorney-General v. King, 5 Price, 195.‖

(D) Of filing an Information, the Proceedings thereon, and the Provisions made herein by Statute.

It seems to be the established practice at this day not to admit of the filing of any information (except those exhibited in the name of his majesty's attorney-general) without first making a rule on the persons complained of to show cause to the contrary; which rule is never granted but upon motion made in open court, (*a*) and grounded upon affidavit of some misdemeanor, which, if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution; and if the person, on whom such rule is made, having been personally served with it, do not at the day given him for that purpose give the court good satisfaction by affidavit that there is no reasonable cause for the prosecution, the court generally grants the information; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule; as, if they purposely absent themselves, &c. (*b*)

2 Hawk. P. C. c. 26, § 8. β Respublica v. Griffiths, 2 Dall. 162.γ [(*a*) And the court will require the same evidence in support of such a motion, as would be necessary in support of an indictment. R. v. Willett, 6 T. R. 294.—A joint information against several defendants cannot issue upon distinct rules for one or more informations against each, 3 Burr. 1270. (*b*) R. v. Badouin, 2 Str. 1044; Ca. temp. Hardw. 271.]

But, if he show good cause to the contrary, as that he has been indicted for the same cause, and acquitted; or that the intent is to try a civil right which has not been yet determined; or that the complaint is trifling or vexatious, &c., the court will not grant the information without some particular circumstances, the judgment whereof lies in discretion.

2 Hawk. P. C. c. 26, § 9. [The discretion of the court in granting informations is guided by the merits of the person applying, R. v. Bickerton, 1 Str. 498; R. v. Miles, Dougl. 283, R. v. Haswell, Ibid. 387; R. v. Webster, 3 T. R. 388; R. v. Hankey, 1 Burr. 316; R. v. Peach, Ibid. 548; R. v. Symonds, Ca. temp. Hardw. 240; R. v. Robinson, 1 Bl. Rep. 541; by the time of the application, R. v. Robinson, 1 Bl. Rep. 541; by the nature of the case, R. v. Spriggins, 1 Bl. Rep. 2; R. v. the Inhabitants of Wigan, Ibid. 47; R. v. Grosvenor, 2 Str. 1193; 1 Wils. 18, R. v. Robinson, 1 Bl. Rep. 541, and by the consequences that may possibly result from it. 1 Bl. Rep. 541.—The court will never grant an information on a penal statute, where the penalty vests in the crown only; in that case the attorney-general must file it. R. v. Hendricks, 2 Str. 1234. Nor will they interfere upon the application of the attorney-general, in cases prosecuted by the crown, for he may exhibit an information himself. R. v. Philips, 3 Burr. 1564.] ‖ And great inconvenience having been felt from obliging persons in low circumstances to show cause against informations, and to travel afterwards up to Westminster, from, perhaps, a very remote part of the country, and, consequently, at a great expense, to receive judgment; the court has come to a resolution not to grant an

nformation against such persons, however fit the subject may be for prosecution; as justice can be effectually done otherwise, and the proceeding by way of indictment is evidently the more proper. R. v. Compton, Cald. 246. It is to be regretted, that this rule has not been adopted by the attorney-general in prosecutions by him under the revenue laws.‖

As to the provisions made herein by statute, by the 4 & 5 W. & M. c. 18, reciting, that divers malicious and contentious persons had, more of late than in times past, procured to be exhibited and prosecuted informations in their majesties' Courts of King's Bench at Westminster against persons in all the counties of England, for trespasses, batteries, and other misdemeanors; and after the parties so informed against had appeared to such informations, and pleaded to issue, the informers had very seldom proceeded any farther, whereby the persons so informed against had been put to great charges in their defence; and although at the trials of such informations verdicts had been given for them, or a *noli prosequi* entered against them, they had no remedy for obtaining costs against such informers; it is enacted, "That the clerk of the crown in the said Court of King's Bench for the time being, shall not, without express order to be given by the said court in open court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognisance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, title, or profession, to be entered, to the person or persons against whom such information or informations is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute such information or informations, and abide by and observe such orders as the court shall direct; which recognisance the clerk of the crown, and also every justice of the peace of any county, city, franchise, or town corporate, (where the cause of any such information shall arise,) are hereby empowered to take; after the taking thereof by the said clerk of the crown, or the receipt thereof from any justice of the peace, the said clerk of the crown shall make an entry thereof upon record, and shall file a *memorandum* thereof in some public place in his office, that all persons may resort thereunto without fee: And in case any person or persons against whom any information or informations for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to issue, and that the prosecutor or prosecutors of such information or informations shall not at his and their own proper costs and charges within one whole year next after issue joined therein procure the same to be tried; or if upon such trial a verdict pass for the defendant or defendants; or in case the said informer or informers procure a *noli prosequi* to be entered; then in any of the said cases the said Court of King's Bench is hereby authorized to award to the said defendant or defendants, his, her, or their costs, unless the judge, before whom such information shall be tried, shall at the trial of such information in open court certify upon record, that there was a reasonable cause for exhibiting such information; and in case the said informer or informers shall not within three months next after the said costs taxed, and demand made thereof, pay to the said defendant or defendants the said costs, then the said defendant or defendants shall have the benefit of the said recognisance to compel them thereunto.

"Provided, that nothing herein shall extend or be construed to extend to any other informations than such as shall be exhibited in the name of their majesties' coroner, or attorney in the Court of King's Bench for the time being, commonly called the master of the Crown-office."

In the construction hereof it hath been holden,

1. That if process be issued on such information before such recognisance is given as the statute directs, the same may be set aside and discharged on motion.*

2 Hawk. P. C. c. 26, § 10. *The meaning of this statute is, that the clerk of the crown shall not file any information without leave, nor issue process thereupon, without recognisance. *Per* Lord Hardwicke, Ca. temp. Hardw. 248.

2. That this statute extends to all informations except those exhibited in the name of his majesty's attorney-general, (*a*) so that an information in nature of a *quo warranto*, though a proper remedy to try a right, in respect of which it may not in strictness come within the words *trespasses*, &c., yet as it is also intended to punish a misdemeanor, and as the proceedings therein may be as vexatious as in any other, the same is within the purview of the statute, which, being a remedial law, shall receive as large a construction as the words will bear.

R. v. Town of Hertford, Carth. 503; Salk. 376, S. C.; Ld. Raym. 426, S. C. adjudged; R. v. Morgan, 2 Str. 1042; R. Marsden, 3 Burr. 1812. (*a*) || In R. v. Barker, P. 11 G. B. R. an information was granted against the defendant for corrupt practices in his office of justice of the peace. Pratt, C. J., said, the attorney-general was not restrained by this act from filing an information. The attorney-general, who was of counsel with the defendant, said, since this act it had not been usual, except where the king himself is concerned. Lord Camden's MSS.||

3. That no costs can be had on this statute on an acquittal at a trial at bar, not only because the clause that gives costs, unless the judge certify a reasonable cause, seems only to have a view to trials at *nisi prius;* ||(for after a trial at bar, the judges cannot make a certificate to themselves, that there was a reasonable cause for the information;)|| but also because a cause which is of such consequence as to be thought proper for a trial at bar, cannot well be thought within the purview of the statute, which was chiefly designed against trifling and vexatious prosecutions.

2 Hawk. P. C. c. 26, § 11.

4. That if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs.

Salk. 194.

5. That wherever a defendant's case is such as authorizes the court to award him his costs, he has a right to them *ex debito justitiæ;* for it seems a general rule, that where judges are empowered by statute to do a matter of justice, they ought to do it of course.

2 Ch. Ca. 191; 2 Hawk. P. C. c. 26, § 13.

[6. That to whatever sum the costs of the defendant may amount, he cannot on this statute, have more than the amount of the recognisance; nor, on the application for the information (*b*) will the court compel the prosecutor to give security for the costs over and above the 20*l*.

R. v. Howell, Ca. temp. Hard. 247; 2 Str. 1042; *semb.* S. C. by the name of R. v. Morgan; R. v. Filewood, 2 T. R. 145. (*b*) R. v. Brook, Ibid. 197.]

|| This act of W. & M. as we have seen, restrains the clerk of the crown in the King's Bench from exhibiting or filing informations without leave of the court in cases where all the king's subjects might, before the making of it, have made use of his name without such leave. The act immediately following, viz. the 9 Ann. lets in everybody, who desires it, to make use of his name in prosecuting usurpers of franchises; whereas before no subject could have done so: but it provides, that these informations (as well as

those for misdemeanors) must be under the leave and discretion of the court.

3 Burr. 1616. *Per* Wilmot, J.‖

By the 9 Ann. c. 20, § 4, it is enacted, "That in case any person or persons shall usurp, intrude into, or unlawfully hold and execute the offices of mayors, bailiffs, portreeves, or other offices within cities, towns corporate, boroughs, or places (*a*) in England or Wales, or into the franchises of being burgesses or freemen of such cities, towns corporate, boroughs or places, it shall and may be lawful to and for the proper officer of the Court of Queen's Bench, the courts of sessions of counties palatine, or the court of grand sessions in Wales, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of informations in the nature of a *quo warranto:* and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave (*b*) to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises; and such person or persons, against whom such information or informations in nature of a *quo warranto* shall be sued or prosecuted, shall appear and plead, as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons, against whom such information shall be exhibited, to plead; and such person or persons, who shall sue or prosecute such information or informations in the nature of a *quo warranto*, shall proceed thereupon with the most convenient speed that may be."

(*a*) [These words, it is now settled, apply only to offices in corporations, not to offices in boroughs and other places not corporate. R. v. Wallis, 5 T. R. 375. Nor do they extend to *all* offices within corporations. R. v. Williams, 1 Burr. 407; 1 Bl. Rep. 93, S. C.] ‖ The statute of 32 G. 3, c. 58, which enables defendants in *quo warranto* to plead double, has received the same construction with this statute, and is confined to corporate offices. R. v. Richardson, 9 East, 469; R. v. Bingham, Ibid.‖ (*b*) [There is no necessity to state this leave on the record. Summers v. Regem, Cowp. 489.]

And it is further enacted, § 5, "That in case any person or persons against whom any information or informations in the nature of a *quo warranto*, shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of a usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of *ouster* (*c*) against such person or persons of and from any of the said offices and franchises, as to fine such person or persons respectively for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators in such information named shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, (*d*) he or they, for

whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators; such costs to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit*."

(*c*) ‖ Before this statute it was far from being a clear point, that judgment of ouster could ever be entered up in informations in the nature of a *quo warranto*. Lord Chief Justice Holt declared his doubts of it often; and to settle those doubts this clause of the statute was made. 2 Barnardist. 281. (*d*) Where a relator does not proceed to trial, it hath been adjudged, that within the equity of this branch of the statute, he shall pay costs. Anon. Say. Rep. 130; R. v. Powell, 1 Str. 33.‖

And it is further enacted, § 7, "That the statute for the amendment of the law, and all the statutes of jeofails, shall be extended to informations in nature of a *quo warranto*, and proceedings thereon, for any the matters in the said act mentioned."

[This act extends only to individuals usurping offices or franchises in a corporation; and not to the corporation itself as a body; if a corporation, as a corporation, usurp upon the crown, the information must be by and in the name of the attorney-general, on behalf of the crown.

R. v. Corporation of Carmarthen, 2 Burr. 869; 1 Bl. Rep. 187; 1 T. R. 2; R. v. Trevenen, 2 Br. & A. 482. ‖ But, where the corporation is dissolved, and no corporate body exists in point of fact, the information will not be granted against an individual for an impertinent claim to a corporate office. R. v. Saunders, 3 East, 119. Nor will it be granted against a mere servant of a corporation, whose office does not affect any franchise or other authority holden under the crown. R. v. The Corporation of the Bedford Level, 6 East, 356. It has been granted however against persons for exercising the office of commissioners under a paving act, to whom a power was given of imposing rates and taxes; for that was a power greater than the crown itself could confer. R. v. Badcock, Ibid. 354.‖

The act is meant to extend to all officers of corporations as such; but it is not within the reason or meaning of it that it should extend generally to all offices or franchises exercised without authority from the crown within a corporation. It was meant to be confined to such franchises as are claimed in instances affecting those rights between party and party, and to give a remedy which could not be had at common law, in those disputes, and which frequently settle the right of voting at elections.

R. v. Williams, 1 Burr. 407; 1 Bl. Rep. 95.

In the exercise of their jurisdiction under this act, the court are of course guided by the particular circumstances of the respective cases that may be brought before them. Where the right, or the fact on which the right depends, is disputed;(*a*) or where the right turns upon a point of new or doubtful law;(*b*) or where (*c*) sufficient appears on the affidavits to draw the merits of an election to a corporate office into question,and the fact of usurpation is, though only faintly, alleged by the deponents, and not denied by the defendant; or where there is no other remedy; (*d*) the information is usually granted. But, if the defendant can show, that his right to the franchise in question hath been already determined on a *mandamus*,(*e*) or that it hath been acquiesced in for a great length of time;(*g*) or that it depends on the right of those who voted for him, which hath not yet been tried; or that the person upon whose right the defendant's title depends hath enjoyed his franchise so long, that the court would not permit it to be impeached in this mode of proceeding;(*h*) or it seems, that such person is dead;(*i*) or that so great a number of derivative titles would be affected by a judgment against the defendant, that it would tend to dissolve the corporation;(*k*) or that the franchise no way concerns the public, (as all those which relate to the government of a corporation,or the election of members of parliament,(*l*) and fairs and markets, (*m*) &c., are said to do,) but is wholly of a private

nature, as a coney-warren,(*n*) &c.; or that the election, by which he claims, is agreeable to charter; or that he hath never acted under it, that there hath been no user of the franchise; (*o*) the court will not grant the information unless there be some particular or extraordinary circumstances in the case; the determination whereof being wholly left to the discretion of the court, cannot well come under any certain stated rules.

(*a*) R. v. Latham, 3 Burr. 1485; 1 Bl. Rep. 468; Rep. v. Sargent, 5 T. R. 466; R. v. Duke of Richmond, 6 T. R. 560. (*b*) R. v. Carter, Cowp. 58; R. v. Godwin, Dougl. 397. (*c*) R. v. Harwood, 2 East, 177. (*d*) Bull. Ni. Pri. 212. (*e*) 2 Hawk. P. C. c. 26, § 9. (*g*) The time within which a title to a corporate office might be impeached by a *quo warranto*, was, by the common law, indefinite; it varied with the circumstances of each particular case: R. v. Powell, 8 Mod. 165; R. v. Pike, Ibid. 286, cited; 1 T. R. 4, n.; 3 T. R. 311; R. v. Williams, 2 Str. 677; and it was for some time thought better that it should be unsettled. R. v. Latham, 3 Burr. 1485. At length, however, the court set a limit to their discretionary power in granting informations of this kind, and confined it, in analogy to other cases of limitation, within a period of twenty years; Winchelsea causes, 4 Burr. 1962, 2022, 2120; R. v. Rogers, Ibid. 2523; which limitation was afterwards still farther narrowed, and reduced to a period of six years, R. v. Dickin, 4 T. R. 282. This last period hath been confirmed by the legislature, viz. by stat. 32 Geo. 3, c. 58, and is extended as well to informations filed by the attorney-general, on behalf of the crown, as to those promoted at the instance of any private person. (*h*) R. v. Stephens, 1 Burr. 433; R. v. Peacock, 4 T. R. 684. (*i*) Vide R. v. Spearing, 1 T. R. 4, n. But it does not seem to be a reason for refusing an information, that the objection to the defendant's title ariseth from a defect in the title of some other person through whom he claims, provided the application be made within proper time. 8 Mod. 216. For it is admitted, that where judgment of ouster hath been given against a person through whom a title is claimed, that may be a reason for granting an information to impeach the derivative title. 2 Str. 1109; Andr. 389; 5 Burr. 2601; Cowp. 500. It is also admitted, that the title of a defendant to an information may be impeached by an issue introduced on the record, respecting the title of the person under whom he claims, though the latter hath not been ousted on an information filed against him. Ibid. It may, or it may not be possible to impeach the original right on which the derivative title depends, by an information filed against the person who claimed to exercise that right. Whatever may be the case, where that may be done, but in fact has not been done; it has been lately decided, that where it cannot be done, the original right may be impeached in an information against the person whose derivative title depends upon it. R. v. Mein, 3 T. R. 596; 2 Kyd. 435, 436. (*k*) R. v. Varlo, Cowp. 59; R. v. Trevenen, 2 B. & A. 479. *Secus*, if it be admitted that elections may still be made. R. v. Bond, 2 T. R. 767. (*l*) Case of the borough of Horsham, Hil. 30 G. 3; 3 T. R. 599, n.; R. v. Mein, Ibid.; R. v. Bingham, 2 East, 308. (*m*) *Qu.* ‖ whether in the case of markets, courts-leet, &c., the crown's name can be made use of at the instance of a subject?‖ and vide R. v. Marsden, 3 Burr. 1812; 1 Bl. Rep. 579; Ibbotson's case, Ca. temp. Hard. 261; Hard. 162, *arguendo*. In R. v. Parks, 10 G. in B. R., upon a rule to show cause why an information in the nature of a *quo warranto* should not be granted against the defendant for claiming the return of juries as steward of a court leet-in the manor of Birmingham, in the county of Warwick; Fazakerly moved, that a charge of misdemeanor was more proper, as in cases where justices of peace exceed the limits of their jurisdiction. But the court did not think this a parallel case: and therefore the rule was made absolute. Lord Camden's MSS.‖ (*n*) R. v. Sir William Lowther, 2 Ld. Raym. 1409; 1 Str. 637; Ibbotson's case, Ca. temp. Hardw. 261; R. v. Cann, Andr. 15; R. v. Dawbeny, 2 Str. 1196; 1 Bott. pl. 326; R. v. Shepherd, 4 T. R. 381. (*o*) R. v. Ponsonby, Say. Rep. 245; R. v. Whitwell, 5 T. R. 85. ‖ A swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation, was holden to be a sufficient user of the office to warrant an information, and not like a mere claim. R. v. Tate, 4 East, 337.‖

So, the conduct and situation of the relator, will weigh much with the court, in some instances, in granting or refusing an information. Thus, where the persons on whose affidavits the motion is grounded, have lain by without recently prosecuting, though with a full knowledge of the fact; (*a*) where they have concurred with the rest of the corporation in a resolution

not to take advantage of the flaw in the defendant's title; (*b*) where the prosecutor stands in the same circumstances with the defendants; (*c*) where the persons, in whose names the application is made, are wholly unconnected with the corporation (*d*)—in all these cases, the court will, in general, refuse the information.

(*a*) R. v. Wardroper, 4 Burr. 2024. (*b*) R. v. Mortlock, 3 T. R. 300. But previous knowledge of the fact in the person on whose affidavit the motion is made, will not be a ground for refusing the information, if he had no power of remonstrating against the proceedings; if he were in fact merely a witness, as in the case of an application on the affidavit of the town clerk. R. v. Binsted, Cowp. 75. Nor will the relator's concurrence in the election of the defendant be any ground for refusal, if the objection to his eligibility were at that time unknown. R. v. Smith, 3 T. R. 573; R. v. Morris, 3 East, 213. And where the application is made on the affidavit of several persons, all of whom, but one, concurred in the election of the defendant: if that one will avow himself the relator, and render himself responsible for the costs, his being joined with the others who concurred in the election, will be no reason for refusing the information. R. v. Symmons, 4 T. R. 223. (*c*) R. v. Bond, 2 T. R. 771; R. v. Cudlipp, 6 T. R. 503. (*d*) R. v. Stacey, 1 T. R. 3. But, where the application is made for the purpose of enforcing a general act of parliament, which interests all the corporations in the kingdom, it is no objection, that the party applying is not a member of the corporation. R. v. Brown, P. 29 G. 3; 3 T. R. 574, n. ‖ The case must be very strong to induce the court to grant the information on the relation of a mere stranger. R. v. Kemp, 1 East, 462.‖ The abandonment of a former information for the same cause is, of itself, no reason for refusing an information, as that may have been by collusion. R. v. Bond, 2 T. R. 770. ‖ But, where the ground on which an information is moved has been answered, the court will not make the rule absolute for the purpose of trying an incidental and secondary question. R. v. Osbourne, 4 East, 327.‖ Where the application is manifestly frivolous and vexatious, the rule will be discharged with costs. 2 Str. 1039; 2 Burr. 780; 3 T. R. 301.

Where the affidavit of the relator omits a material fact, as the mode of election; but that fact is afterwards stated in the defendant's affidavit, the court may use the latter affidavit in support of the application.

R. v. Mein, 3 T. R. 596.]

‖But, if in the application for the information it be suggested, that the defendants were elected contrary to the provisions of a particular charter, the affidavit must state that the charter has been accepted, or, at least, that the usage has been according to the charter, so as to afford an inference of its having been accepted.

R. v. Barzey, 4 M. & S. 253.

The party's resignation of the office in question after the rule *nisi* has been obtained will not prevent it from being made absolute, though it may regulate the discretion of the court in imposing the fine.

R. v. Warlow, 2 M. & S. 75.‖

[It seems, that the court will not grant a rule for an information of this kind on the last day of term.

R. v. Davies, Say. Rep. 241.

Where a defendant suffers the rule to be made absolute without showing cause; or suffers judgment to go against him by default; the court will permit other corporators, whose title may be affected by judgment of *ouster* being pronounced against him, to defend his title, on their undertaking to do so at their own expense, and indemnifying him against all costs.

R. v. Davies, 4 Burr. 2277.]

The process usually issued to bring the defendant into court is a writ of subpœna, and if that be disobeyed, an attachment: but if the defendant can-

not be served with a subpœna, it is said, the process is *venire facias* and *distringas*.

1 Sid. 86; 2 Kyd. 438. It hath been said, that process of outlawry will not lie upon informations in nature of *quo warranto*, and therefore that the defendant cannot plead a misnomer. R. v. Mayor of Hedon, 1 Wils. 245. But *qu.* and see 2 Kyd. 438, 439. See also Patrick's case, Cr. Ja. 528.

The plea in bar must set out the defendant's title at length, and conclude with a general traverse, "without this, that he usurped," &c., and issue should not be taken on the part of the crown, on the general traverse, but the replication should be to the special matter, that the defendant may know how to apply his defence.

R. v. Blagden, Gilb. Rep. 145; 10 Mod. 212, 296, S. C.

Where several things are necessary to constitute a complete title in the defendant, the crown may take issue on each, and if any one of the issues on a fact material to the title be found against the defendant, there shall be judgment of ouster, and the defendant shall pay the costs on all the issues.

R. v. Earle, 1 Str. 627; 2 Ld. Raym. 1447; R. v. Downes, 1 T. R. 453; R. v. Hebden, Andr. 388; R. v. Leigh, 4 Burr. 2143.

Where the defendant sets forth a bad title to the office, and confesses the user, that amounts to a confession of the usurpation, and if an immaterial issue is joined, and a verdict found on which the court cannot give judgment, yet they will not grant a repleader, but will give judgment on the plea.

R. v. Phillips, 1 Str. 294, cited 1 Burr. 302, 305.

But, where the defendant, in his plea, confesses a usurpation during part of the time laid in the information, but insists upon an election afterwards under which he continued to hold the office, judgment of *ouster*, as to the time confessed, ought not to be given against him, but only a judgment of "*capiatur pro fine*," (*a*) as a punishment for his usurpation: for, if judgment of ouster were entered, it would follow, that, when a person has once exercised an office without authority, he becomes, so long as he does so, incapable of being rightfully elected. And if, in such case, a judgment of ouster be actually entered, the court will order the whole to be expunged, but that part which relates to the fine.

R. v. Biddle, 2 Ld. Raym. 952; 2 Kyd. 442; R. v. Taylor, 2 Barnardist. 238, 280.]

(*a*) ‖ Where, upon an information against one for claiming the office of alderman, he disclaimed, and judgment of ouster was given against him, he was concluded from showing to a second information for exercising the same office, that he was duly elected before such information and judgment of ouster, and was afterwards sworn in by virtue of a peremptory mandamus. R. v. Clarke, 2 East, 75. In this case Lord Kenyon intimated that there might have been a judgment of ouster *quousque* only against him, and referred to the case of R. v. Biddle, in the text. But *qu.*, for there seems to be no precedent of such a judgment on the files of the court. See R. v. Courtenay, 9 East, 246.‖

‖But, if the defendant has done that which implies a claim, though he has not expressly made a claim, judgment of ouster must be given, lest he should repeat the act.

R. v. Williams, 1 Bl. Rep. 93.‖

[If a defendant make title to a corporation office, as being elected under the mayoralty of a particular person; on issue joined whether that person were mayor or not, a record of ouster against him may be read in evidence to show that he was not mayor, which will be conclusive, if it be not shown that the judgment was obtained by fraud or collusion.

R v. Hebden, 2 Str. 1109; Andr. 389; R. v. Grimes, 5 Burr. 2598.

But, if the person under whom the defendant claims be dead at the time when the issue "whether he were mayor or not," is tried, the only evidence that will be admitted, will be to prove whether he were mayor or not in point of fact.

R. v. Spearing, 1 T. R. 4, n.

Where the persons, on whose right to vote the validity of the defendant's title depends, were at the time of his election in the actual possession of the franchise in virtue of which they voted; at the trial no inquiry can be made into their right, unless an issue has been taken upon it.

Symmers v. Regem, Cowp. 507.

As an information of this kind is now considered rather as a civil proceeding, a new trial may be granted as well where there has been a verdict in favour of the defendant, as where it has been given in favour of the crown.

R. v. Francis, 2 T. R. 484.]

‖And on a trial at bar of such an information, a bill of exceptions has been tendered by the defendant's counsel, and allowed by the court: though it does not appear that the case was afterwards argued in the court of error.

R. v. Higgins, 1 Ventr. 366; Sir T. Raym. 484, S. C.; Skin. 101, S. C. In the case of informations in the Exchequer, Lord Hardwicke said, that when he was attorney-general, he had known a bill of exceptions allowed; "but then," said he, "these are properly civil suits for the king's debts." R. v. Preston, Ca. temp. Hardw. 249. *Qu.* and see what is said by his lordship in the case of R. v. Howell, Ibid. 248.‖

[The information cannot be quashed, even with the consent of parties; though with such consent, the court will permit the recognisance to be discharged.

R. v. Edgar, 4 Burr. 2297.]

‖By st. 32 G. 3, c. 58, "it shall and may be lawful for the defendant or defendants to any information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, whether exhibited with leave of the court, or by his majesty's attorney-general, or other officer of the crown on behalf of his majesty, by virtue of any royal prerogative or otherwise, and each and every of them severally and respectively, to plead that he or they had first actually taken upon themselves, or held or executed the office or franchise which is the subject of such information, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office or franchise; which plea shall and may be pleaded either singly or together with and besides such plea as he or they might have lawfully pleaded before the passing of this act, or such several pleas as the court on motion shall allow; and if upon the trial of such information the issue joined upon the plea aforesaid shall be found for the defendant or defendants, or any of them, he or they shall be entitled to judgment, and to such and the like costs as he or they would by law have been entitled to if a verdict and judgment had been given for him or them upon the merits of his or their title."

§ 2. "Provided always, that in every such case the prosecutor of such information may reply to such plea any forfeiture, surrender, or avoidance by the defendant of such office or franchise happening within six years before the exhibition of such information, whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid."

§ 3. "If any person or persons against whom any such information as aforesaid shall be exhibited, shall derive title under an election, nomination, swearing into office, or admission by any person or persons, the title of such person or persons against whom such information shall be exhibited shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, swearing into office, or admitting, in case such person or persons under whom title shall be derived as aforesaid, was or were in exercise *de facto* of the franchise or office, (in virtue of which he or they so elected, nominated, swore in, or admitted,) at a period six years at least previous to the time of filing such information, and his or their title shall not have been questioned by any legal proceeding carried on with effect."

In the construction of this statute it hath been ruled, that the "six years before the exhibiting of the information," mean six years before making the rule absolute for filing the information, and not six years before obtaining the rule *nisi;* so that the court will not make the rule absolute, if the six years are then expired though they were not expired before the rule *nisi* was granted.

R. v. Stokes, 2 M. & S. 71; R. v. Rogers, 4 Burr. 2524. But R. v. Brown, 3 T. R. 575, n. *contr.*

But a title to one office, which is a qualification to hold another office, is not within the third section of the statute respecting derivative titles; and therefore although the party had exercised the first for six years, the rule was made absolute for an information for exercising the second office upon a defect of title to the first.

R. v. Stokes, *ubi supra.*

The defendant may under this act plead several pleas, either with or without the plea of the statute of limitations; for the concluding words are, "or such several pleas as the court on motion shall allow." But before this act he was not at liberty to plead double.

R. v. Antridge, 8 T. R. 467; Reg. v. Foley, cited in Parker, 10; R. v. Newland, 4 Burr. 2146, notes; R. v. Briscoe, Ibid.‖

[After rules have been made absolute for several informations, the court will consolidate them at the instance of the defendants: ‖ but not where they are against several persons for distinct offices, for there must be an information against each to enable each to disclaim.‖

R. v. Foster, 1 Burr. 573;]‖ R. v. Warlow, 2 M. & S. 75.‖

‖ The court will not grant a rule to stay proceedings until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested.

R. v. Wynne, 2 M. & S. 346.

But, where the relator was in low and indigent circumstances, and there were strong grounds of suspicion that he was applying, not on his own account or at his own expense, but in collusion with a stranger, the court would not make the rule for the information absolute.

R. v. Trevenen, 2 B. & A. 339.

An information for penalties under the game law is not an information, within the meaning of the 48 G. 3, c. 58, whereby if the defendant neglect to appear and plead, the prosecutor is at liberty to enter an appearance and plea of not guilty for the defendant; and therefore where the prosecutor had entered an appearance and plea of not guilty for the defendant, and a verdict had been found against the defendant, the court set aside the verdict

for irregularity. The 48 G. 3, c. 58, is confined to offences as to which the King's Bench has exclusive jurisdiction by indictment or information.

Davies v. Bint, 2 Barn. & C. 586.

Evidence to the character of a defendant is not admissible on the trial of an information in the Exchequer.

Attorney-General v. Bowman, 2 Bos. & P. 532, n.

At p. 183, it is stated, on the authority of Rex *v.* Richardson, 9 East, 469, that the 32 G. 3, c. 58, enabling defendants in *quo warranto* to plead double, is, as well as the 9 Ann. c. 20, confined to corporate offices; but in a late case the court discharged a rule for quashing an information for exercising the office of bailiff in a borough, although not a corporate office, since the information was founded on the common law. *Quære*, Whether in such a case the defendant can plead several matters.

Rex v. Highmore, 5 Barn. & A. 771.

The stat. 32 G. 3, c. 58, which enables the defendant to plead the limitation of six years to a *quo warranto*, does not apply where there is a continuing disability, as where a burgess has accepted the office of town-clerk which he still holds.

2 Chitt. R. 371.

In a *quo warranto* for exercising the office of mayor, if issue is joined that the presiding officer at the defendant's election as mayor was not mayor, the *title* of the presiding officer to be mayor, and not merely whether he was mayor *de facto*, is put in issue, and evidence is admissible to show that such presiding officer was not duly elected mayor.

Rex v. W. Smith, 5 Maule & S. 271.

But the title of the electors (*being corporators*) cannot be questioned in a proceeding against the elected, since they may be ousted by a *quo warranto*, therefore where in *quo warranto* for usurping the office of mayor, the defendant pleaded duly elected, and the replication stated that there were two candidates, that fifty good votes tendered for the losing candidate were improperly rejected, and that others were improperly admitted to vote for the defendant, and that the majority of legal votes was in favour of the other candidate; the replication was held bad, not only as being a mere argumentative denial of the defendant's being duly elected, but also for attempting to put in issue the title of the electors being corporators *de facto*.

Rex v. Hughes, 4 Barn. & C. 368.

In a *quo warranto* for usurping the office of a burgess of Monmouth, pleas setting forth the defendant's election according to alleged custom and charter, and stating that the notice of the election was by immemorial custom by ringing a bell, are bad, for such a notice is not reasonable.

Rex v. Hill, 1 Barn. & C. 426.

It cannot however be laid down generally, that there cannot be a lawful meeting to elect a burgess without a notice to every member of each select body electing of the purpose of the meeting, for if all the members of each select body electing were present and concurred in the election, the election would be good without notice; and therefore to a plea (to a *quo warranto* information for exercising the office of burgess) stating the defendant's election, in pursuance of the custom and charter of the borough, by the mayor and majority of the aldermen and majority of the capital burgesses, being the major part of the common council at a meeting duly assembled, a repli-

cation alleging that no notice of the purpose of the meeting was given to the aldermen or capital burgesses of the borough was held bad.

Rex v. Chetwynd, 7 Barn. & C. 695.

On a *quo warranto* it appeared that by the charter of the borough there were to be ten aldermen and ten capital burgesses, and vacancies in the body of aldermen were to be filled up out of the capital burgesses; it was held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office, and that a person so elected and afterwards ousted on *quo warranto*, was thereby restored to his office of capital burgess. And therefore, where a capital burgess became an alderman *de facto* by means of a void election, and in the character of alderman attended and voted at an election of mayor, but was afterwards ousted on *quo warranto*, it was held, that he could not be considered as having attended and voted as a capital burgess.

Rex v. Hughes, 5 Barn. & C. 886; Rex v. Hubball, 6 Barn. & C. 139.

Where, on application for a *quo warranto* against a constable, the affidavits in support of the rule stated a custom for fifty years back, and as long as dependents could recollect, to elect a constable in a particular mode, but did not state that they believed such custom to be immemorial, it was held not sufficient.

Rex v. Lane, 5 Barn. & A. 488.

The office of register and clerk of the Court of Request in the city of Bristol, created by statute, is not an office within the meaning of 9 Ann. c. 20, (see p. 183,) and therefore judgment having been given for the defendant on a *quo warranto* for using it, he was held not entitled to costs.

Rex v. Hall, 1 Barn. & C. 237.

To a *quo warranto* for usurping the office of bailiff of the borough of Stockbridge, being an office "of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return of members to serve in parliament for the borough;" the defendant's pleas showed that he had been elected to the office, and traversed "that the office was one touching the rule and government of the borough." There were several replications taking issue on the facts stated as inducement to the defendant's traverse (but they did not notice the traverse,) and special replications setting up various customs as to the election of bailiffs, to which replications the defendant demurred; it was held, that the defendant, not having traversed that the office was one of "great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in parliament," had admitted it to be so, and that for such an office a *quo warranto* would lie; and 2dly, that the general replications being clearly good, and the demurrer being to all the replications, judgment must be given for the crown. *Quære*, Whether the special replications were good?

Rex v. M'Kay, 4 Barn. & C. 351.

On a motion for a *quo warranto* against a corporator for irregularity in his election, it is no answer that the relator frequently acted with the party against whom he applies in corporation business, during the two years following such party's election, the relator not being shown to have concurred in that election, nor is the relator disqualified by the mere circumstance of having formerly taken part in other elections, when the same irregularity existed but *was not noticed.*

Rex v. Benney, 1 Barn. & Adol. 684.‖

β (E) Of Informations under the Laws of the United States.

This head will be divided by considering separately, 1. In what court; 2. For what offence an information will lie; 3. Form of the information; 4. Of the evidence and proceedings under informations; 5. Of the rights of the informer.

§ 1. *In what Court Informations will lie.*

The District Court of the district where the seizure is made, and not where the offence was committed, has jurisdiction of proceedings *in rem*, for an alleged forfeiture.

9 Wheat. 391.

When the seizure is made out of the jurisdiction of the United States, whether on the high seas or within the territory of a foreign power, the District Court has jurisdiction within whose territorial jurisdiction the property is brought.

9 Wheat. 391.

An information for an illegal outfit will lie in the Circuit Court.

The Cassius, 2 Dall. 368.

Informations *in rem* for forfeitures under the laws of imposts, lie on the admiralty side of the District Courts.

Clark v. The United States, 2 Wash. C. C. R. 519.

§ 2. *For what Offence an Information will lie.*

When goods have been smuggled; or when, by mistake, no bond has been given; or when short duties have been paid, an information of debt, or an information in the nature of a bill of discovery and account, is the proper remedy for the United States.

United States v. Lyman, 1 Mason's C. C. R. 482.

An information may be lawfully filed under the act of 1809, ch. 72, s. 1.

United States v. Mann, 1 Gallis, C. C. R. 3.

It seems that an information does not lie for a penalty imposed by the consular act of 1803, ch. 62, s. 4, for not depositing the ship's register with the consul on arrival at a foreign port.

Parsons v. Hunter, 2 Sumn. 419.

§ 3. *Of the Form of an Information.*

An information for a statute forfeiture should conclude "against the form of the statute," or at least should refer to some subsisting statute authorizing the forfeiture.

The Nancy, 1 Gallis. 67. But see 9 Wheat. 391.

In an information under the 67th section of the act of 1799, ch. 128, against goods for differing in description from the contents of the entry, it is not necessary that it should allege an intention to defraud the revenue.

200 Chests of tea, 9 Wheat. 430.

It seems that in an information for a forfeiture under the act of 1793, ch. 8, s. 8, it is requisite to allege that the vessel proceeded from some port or place.

The Friendship and cargo, 1 Gallis. 45.

An information in the admiralty for a forfeiture, must contain a substantial statement of the offence; a general reference to the provisions of the statute is insufficient. But a defect of this kind may be supplied by evidence.

The Schooner Hoppet, 7 Cranch, 389; Brig Caroline, 7 Cranch, 496. See United States v. Hayward, 2 Gallis. 485.

(E) Of Informations under the Laws of the United States.

In an information under the act of 1809, ch. 72, s. 3, it is requisite to allege the time of receiving the act at the port where the offence is alleged to have been committed, and also of the notice to unload, because these were material and traversible facts.

The Bolina and cargo, 1 Gallis. 75.

An information under the act of 1799, ch. 128, sect. 50, should contain an allegation that the goods were unladen in some port or place within the collector's district, without a permit from that port or district. But when the port or district is unknown it should be so stated, and that will be sufficient.

United States v. Burnham, 1 Mason, 57.

§ 4. *Of the Evidence and Proceedings under Informations.*

Informations *in rem*, in a case of admiralty and maritime jurisdiction, are not suits at common law, and do not require a trial by jury.

Clark v. The United States, 2 Wash. C. C. R. 519.

An informal libel or information *in rem*, may be amended by leave of court.

The Caroline, 7 Cranch, 496.

Informations *in rem* are not criminal proceedings.

Anonymous, 1 Gallis. 24.

In a prosecution of a vessel, for a violation of a law, positive testimony of the identity of the vessel is not indispensible.

The Schooner Jane v. The United States, 7 Cranch, 363.

A deposition of an informer taken before trial under the act of Congress, when the informer is entitled to a portion of the fine or forfeiture, is not admissible in evidence.

The Thomas and Henry, 1 Brock. 367.

§ 5. *Of the Rights of the Informer.*

To be entitled as an informer, the party must actually give the information which leads to the seizure; any other act will be insufficient.

Brewster v. Gelston, Paine, R. 426.

In an admiralty seizure cause, the court cannot award a proportion of the proceeds of the property condemned to informers, unless some statute authorize such a course; but the court will allow a compensation for expenses incurred in securing and preserving the property.

Ex parte Cahoone and Slocum, 2 Mason, 85.

An informer who is entitled to a part of the forfeiture, who, after the information to the collector, is intrusted by the latter as his agent to take care of the property, and who, then, endeavours to defraud the revenue of the fruits of his seizure by connivance with the party informed against, and fails, is nevertheless entitled to his part as informer. His right as informer cannot be forfeited by his misconduct as agent.

Wescott v. Bradford, 4 Wash. C. C. R. 492.

INJUNCTION.

(A) The several Kinds of Injunctions, and when to be granted.
(B) What shall be a breach thereof, and how punished.
(C) How dissolved.
ℓ(D) Miscellaneous Cases.ℊ

(A) Of the several Kinds of Injunctions, and when to be granted.

An injunction is a prohibitory writ, restraining a person from (*a*) commit ting or doing a thing which appears to be against equity and conscience.

(*a*) An injunction to stay restitution upon an indictment of forcible entry. Moore, 820.—Injunction to stay an interloper's trading to the East Indies, till the validity of the East India Company's patent had been determined, denied. Vern. 127; 2 Chan. Ca. 165.—An injunction to stay an action at law for money lost at gaming, though all the circumstances of fraud were denied by the answer. Vern. 489; 2 Vern. 71.—An injunction denied to enjoin a person from over-stocking a common, where he had granted common on his down to J S for 100 sheep. 2 Vern. 116.

ß An order directing a trustee to suspend further proceedings operates as an injunction.

Deakin's case, 2 Bland, 398.

A writ of injunction ought to be sufficiently explicit on its face by defining the property or matter enjoined, so that a party may clearly know what he is forbidden to do.

Moat v. Holbein, 2 Edw. 188. See Sullivan v. Judah, 4 Paige, 444.

When the law affords a complete remedy for a wrong done, equity will not interfere to prevent its commission, Chancery will interpose by injunction only when the wrong is irreparable.

Trustees of Louisville v. Gwathmay, 1 A. K. Marsh. 554.ℊ

Injunctions issue out of the courts of equity in several instances. The most usual injunction is, to (*b*) stay proceedings at law; as,(*c*) if one man brings an action at law against another, and a bill is brought to be relieved either against a penalty, or to stay proceedings at law, on some equitable circumstances, of which the party cannot have the benefit at law; in such case the plaintiff in equity may move for an injunction, either upon an attachment, or praying a *dedimus*, or praying a further time to answer; for it being suggested in the bill, that the suit is against conscience, if the defendant be in contempt for not answering, or pray time to answer, it is contrary to conscience to proceed at law in the mean time; and therefore an injunction is granted of course; but this injunction only stays (*d*) execution touching the matters in question, and there is always a clause giving liberty to call for a plea to proceed to trial, for want of it, to obtain judgment; but execution is stayed till answer, or farther order.

(*b*) That the Court of Chancery would not grant an injunction in a criminal matter under examination in B. R., and that if it did, the court of B. R. would break it, and protect any that would proceed in contempt of it. 6 Mod. 16, *per* Holt, C. J. ßThe publication of a libel will not be restrained by injunction, upon a bill filed by the party whose character or business will be injured by the publication. Brandreth v. Lance, 8 Paige,

(A) Of the several Kinds of Injunctions.

24.*g*—But, where A. having obtained judgment in ejectment in B. R. against B., had execution awarded, but the under-sheriff refused to execute it; whereupon, by rule of that court, he was ordered to attend, and for not attending, an attachment was awarded against him; and B after all this proceeding, having, on his bill exhibited in Chancery, obtained an injunction, it was moved in Chancery, that this injunction might not extend to stay proceedings against the under-sheriff for his contempt to the court of B. R., for that he was prosecuted for contempt at the king's suit, and it was unnatural for the king by his injunction to stay his own suit in another court, the offence being committed before the bill exhibited; but the motion was denied. Vern. 25. [So, where the plaintiffs claimed a sole, and the defendant a concurrent, right of fishery, and a bill and cross-bill were brought to establish such several claims, which was a submission of their respective rights to the court, and the plaintiffs afterwards caused the defendant's agents to be indicted for a breach of the peace, in fishing in their liberty, the Court of Chancery inhibited the prosecutors from proceeding on the indictment till the hearing of the equity suit and farther order, though it could not strictly grant an injunction. Mayor and Corporation of York v. Pilkington, 2 Atk. 302. For originally and regularly that court cannot grant an injunction to stay criminal proceedings. But, where the matter in dispute, and made the subject of an indictment, is a mere civil right, and may be redressed by an action of trespass, the proper course is to apply to the attorney-general for a *nolle prosequi*. Ibid. Lord Montague v. Dudman, 2 Ves. 396.] ‖ It is true that the court has originally no jurisdiction to enjoin or regulate proceedings upon indictment; but circumstances may give it; as, where it is prosecuted by relators in an information or plaintiffs; they are subject to control by order personally affecting them; but not the defendants. For though Lord Hardwicke, in the above case of Mayor, &c. of York v. Pilkington held, that he would deal with the subject with reference to what was civilly in question between the parties, notwithstanding it was also the subject of a criminal prosecution; yet we do not find that he thought himself justified in that with respect to persons who had not themselves resorted to him. Attorney-General v. Cleaver, 18 Ves. 211.‖ *β* Equity will not interpose in the case of a nuisance, except where the law would not afford an immediate nor an adequate remedy, until irreparable injury might be done. Wingfield v. Crenshaw, 4 Hen. & Munf. 474.*γ* (*c*) So, though the Court will not proceed against a member that has privilege of parliament, yet, if a parliament-man sues at law, and a bill is brought in Chancery to be relieved against that action, the court will make an order to stay proceedings at law till answer, or farther order. Vern. 329. See Wildbore v. Parker, Mosel. 125. (*d*) If declaration be delivered, but if not, all proceedings at law are stayed. 2 Kel. 17, pl. 15, in the Exchequer all further proceedings are stayed, be the action in what stage it may. ‖ In Chancery, if on a service of the injunction, the defendant hath not commenced his action, he cannot sue out process; if he hath, but hath not served the same; but in case he hath, but hath not delivered or filed any declaration, he cannot proceed: but, if there hath been a declaration, he may call for a plea, and for want of it sign a judgment; or if the cause is at issue, he may go on to trial, and if that hath been had and a verdict obtained, he may proceed to judgment, and affirm, if error hath been brought: the injunction stays execution only. But if the injunction hath issued after action brought, it may be extended by a subsequent order to stay trial; but the injunction so extended is entire: the subsequent order is part of it, and must stand or fall with it, and cannot be separated or discharged but upon an application to dissolve generally. 1 Madd. Pr. Eq. 110; 1 Hind, 222; Earnshaw v. Thornhill, 18 Ves. 485; Garlick v. Pearson, 10 Ves. 450; Nelthorpe v. Law, 13 Ves. 323; Bishton v. Birch, 2 Ves. & Beam. 40.‖ [Though an injunction in the Exchequer, regularly, suspends all the proceedings at law, yet that court will upon motion, permit the plaintiff in the action to give notice of trial, upon his undertaking not to sue out execution. For though it may be argued, that such notice of trial cannot have its proper effect, because the party served with it cannot prepare for his defence without the discovery sought by the bill, yet, in effect, he receives no injury by the practice. For if the answer be full, he has gained the desired discovery: if it be exceptionable for insufficiency, or if the injunction be continued on the merits, the notice of trial is a nullity. Legg v. Da Costa, in the Exchequer, Hil. 13 Geo. 3; 3 Wooddes. 410 n. y.]

[Where an estate was settled on a jointress without impeachment of waste except in pulling down houses and felling timber, remainder to her son for life without impeachment of waste generally, remainders over; the son, by leave of the jointress, felled a quantity of timber, and died; after

whose death, a daughter entitled to the next remainder in tail sued her mother-at-law, to recover treble damages, and the place wasted; there being evidence of an express consent, or a general tacit consent, or encouragement to the felling of the timber given by the daughter, she was restrained by injunction from proceeding in her action at law.

Aston v. Aston, 1 Ves. 396.

If a mortgagor bring a bill to redeem, it is at law accounted a breach of the covenant for quiet enjoyment. But, if an action of covenant be in such case brought, equity will grant an injunction.

Pr. Reg. Ch. 211.

If a lord of a manor bring ejectments against his customary tenants on pretence of forfeiture, some of whom file a bill, praying he may show what breaches of the custom he designs to insist upon at the trial, upon the general issue in ejectment, and he is in contempt for not putting in an answer, or the like, the court will order an injunction.

Pr. Reg. Ch. 216.

If bond-creditors of the ancestor have obtained a decree for sale against the heir, an injunction will be granted against other bond-creditors proceeding at law, unless they get judgment before the decree.

Martin v. Martin, 1 Ves. 211. When a court of equity hath, in any case, once taken the fund into its own hands, it will not suffer any proceedings at law. Id. Ibid. Morrice v. Bank of England, Ca. temp. Talb. 217; 3 P. Wms. 402, n. S. C.; 2 Br. P. C. 465, 8vo. ed. S. C.; Brooke v. Reynold, 1 Br. Ch. Rep. 183; Douglas v. Clay, cited Ibid. Hardcastle v. Chettle, 4 Br. Ch. Rep. 163; Askew v. Poulterers' Company, 2 Ves. 90.

Under the forfeiting act in America, the estates of loyalists were directed to be sold for the payment of debts: this was holden to be no ground for an injunction to restrain an action brought in this country on a bond given in America.

Kempe v. Andtill, 2 Br. Ch. Rep. 11.

The representatives of a mortgagee, after foreclosure, sold the estate; and the amount not being sufficient to pay their debt, they brought an action upon the bond: the defendant at law filed his bill praying an injunction, and that the bond might be delivered up to be cancelled, insisting, that as the mortgagee had foreclosed the equity of redemption, and taken the pledge, he had made his election, and relinquished his right to a personal remedy. Lord Thurlowe said, as it was a new case, he would grant the injunction on condition of the plaintiff's bringing the money into court; but his opinion was, that the defendant had a right to proceed at law; and the plaintiff refusing to bring the money into court, the injunction was therefore denied.

Tooke v. Hartley, 2 Br. Ch. Rep. 125.]

Where tenant for (*a*) life is committing waste in cutting down young timber, or (*b*) breaking up or ploughing ancient meadow or pasture, or doing other waste, the tenant in tail shall have an injunction, upon a certificate of filing the bill, and showing an affidavit of waste committed; and this, till answer and farther order; for timber once cut down cannot be set up again.

Hard. 96; Vern. 23. (*a*) So, on a motion to stay a jointress tenant in tail after possibility, &c., from committing waste, the court held, that she being a jointress within the 11 H. 7, c. 20, ought to be restrained, being part of the inheritance, which by the statute she is restrained from aliening. Abr. Eq. 221, Cook and Winford. So, where A being tenant for life, remainder to B for life, remainder to the first and other sons of

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B in tail-male, remainder to B in tail, B (before the birth of any son) brought a bill against A to stay waste, on demurrer to this bill, because the plaintiff had no right to the trees, and none that had the inheritance was party; yet the demurrer was overruled, because waste is to the damage of the public, and B is to take care of the inheritance for his children, if he has any, and has a particular interest himself, in case he comes to the estate. Abr. Eq. 400, Dayrell and Champness.—But, where a jointress had a covenant that her jointure should be of such a yearly value, which fell short; though her estate was not without impeachment of waste, yet the court would not prohibit her committing waste so far as to make up the defect of her jointure. Abr. Eq. 400. (*b*) But, where the plaintiff let a farm to the defendant at an annual rent, and part of it being pasture land, the defendant covenanted among other things, not to break up or plough any part of it, and that if he did plough any part of it, he would pay at the rate of 20*s. per annum* for every acre; on motion for an injunction to stay waste in ploughing, the court said, that the parties themselves have here agreed the damage, and have set a price for ploughing, and therefore they would not grant any injunction; and they declared, if the defendant was plaintiff against paying 20*s. per* acre for ploughing, they would not relieve him. 2 Vern. 119, Woodward v. Gyles. ‖ So, Rolfe v. Peterson, 6 Br. P. C. 470; Lowe v. Peers, 4 Burr. 2228. But the court will interfere under some circumstances, though stipulated damages be reserved; as, where the lessee had covenanted not to plough *ancient* meadow, or if he did, to pay an increase of rent, the court upon his threatening to plough, appears to have granted an injunction. Webb v. Clarke, 18th May, 1782. See also Dulwich College v. Davis, M. 1787; Sir John Warden v. Eklers, 17th Dec. 1739; Fonbl. Eq. Tr. 152. If a man agree not to do an act, and enter into a bond with a penalty to be forfeited on his doing it, the penalty is not to be considered as the price for not doing such act, but the court will relieve by injunction, until the actual damage sustained shall be ascertained by an issue. Hardy v. Martin, 1 Cox, 26.‖

So, if a man be tenant for life without impeachment of waste, with remainder to his first and every other son in tail, though by virtue of that clause, *without impeachment of waste*, he may fell timber, and alter any rooms of the house at his pleasure; yet if he should pull down the house, or any part of the buildings thereunto belonging, equity would enjoin him; but not if he pull down to rebuild; for though the clause, *without impeachment of waste*, gives an (*a*) absolute property in the timber, that he may do therewith what he will, yet he is but tenant for life of the lands and houses; and therefore if he pulls them down in order to vex a son that has disobliged him, he acts with an ill conscience, and ought to be restrained in equity.

Lord Barnard's case, Gilb. Ch. 193; Gilb. Eq. Rep. 127, S. C.; 2 Vern. 738, S C.; Pr. Ch. 454, S. C.; 1 Eq. Ca. Abr. 399, S. C.; 1 Salk. 161, S. C. Such a tenant not only enjoined committing waste, but decreed to put the house, &c., in the same repair it was before. Bp. of London v. Webb, 1 P. Wms. 527; Packington's case, 3 Atk. 215; Bewick v. Whitfield, 3 P. Wms. 266. (*a*) In Vern. 23 it is said, that the estate being without impeachment of waste, no prohibition or injunction is to be granted.—But by Pr. Ch. 454, such a clause does not give leave to fell and cut down the trees, which were for the ornament or shelter of a house, much less to destroy or demolish the house. Vide tit. *Waste*, (N.) Chamberlyne v. Dummer, 1 Br. Ch. Rep. 166, and 3 Br. Ch. Rep. 549; Marquis of Downshire v. Lady Sandys, 6 Ves. 107; Williams v. Macnamara, 8 Ves. 70. (*β*) An injunction will be granted to prevent waste. Earl of Fingal v. Blake, 2 Moll. 50; Casamajor v. Strode, 1 Sim. & Stu. 381; Beatty v. Beatty, 2 Moll. 541; Coffin v. Coffin, Jac. 70; Brydges v. Stevens, 6 Mad. 279; Collard v. Cooper, 6 Mad. 190; Downing v. Palmateer, 1 Monr. 65; Brashear v. Macey, 3 J. J. Marsh. 93; Mayo v. Feaster, 2 M'Cord, Ch. 143; Harris v. Thomas, 1 Hen. & Munf. 18; Pim v. Davies, 1 Hog. 11; White v. Nowlan, 1 Hog. 21; Buck v. Stacy, 2 Russ. 12'; Scott v. Wharton, 2 Hen. & Munf. 25; Cutting v. Carter, 4 Hen. & Munf. 424; Wightman v. Brown, 1 Desaus. 166; Duval v. Waters, 1 Bland, 576; Attorney-General v. Norwood, 1 Bland, 581; Watson v. Hunter, 5 Johns. Ch. 169; Smith v. Poyas, 1 Desaus. 65; Camp v. Bates, 11 Conn. 51. (*γ*)

Also, it is every day's practice to grant an injunction for building on

another man's ground, and such injunction shall go to stay that new building till answer and farther order; and so in the case of stopping up ancient lights.(*a*)

[In cases of nuisance, the court will not interfere before answer, unless the plaintiff state a prescriptive right, or an agreement, and support it by affidavit. Morris v. Lessees of Lord Berkeley, 2 Ves. 452. Attorney-General v. Doughty, Ibid. 453. An agreement, supported by affidavit, will indeed be sufficient to give the court jurisdiction in the first instance. Martin v. Nutkin, 2 P. Wms. 266. *Secùs*, if it be a special case founded on a particular right. 2 Ves. 453.] ‖ In the case of a public nuisance, it is said by Lord Hardwicke that the court will enjoin, but that the application should be by an *ex officio* information by the attorney-general, instancing the case of an interruption of a way behind the Royal Exchange before Lord King. Barnes v. Baker, Ambl. 158; 3 Atk. 750, S. C. In the case of Mayor, &c. of London v. Bolt, 5 Ves. 129, Lord Loughborough granted an injunction upon petition and affidavit, the case being very pressing; but in the Attorney-General at the relation of, &c. v. Cleaver, 18 Ves. 211, Lord Eldon seemed to think that the court could not hold it a nuisance, and therefore enjoin it, without a trial at law. (*a*) But the court will not thus interpose in every degree of darkening even ancient lights. Attorney-General v. Nichol, 16 Ves. 338; 3 Mer. 687; Fishmonger's Company v. E. I. Company, 1 Dick. 163.‖ β See Buck v. Stacy, 2 Russ. 121; Sutton v. Montford, 4 Simm. 559.*g*

β An injunction will not be granted to prevent a mere trespass, unless the complainant has been in the previous undisturbed enjoyment of property under claim of right, or when, from the want of responsibility in the defendants, or otherwise, the complainant could not obtain relief at law.

Hart v. Mayor, &c. of Albany, 3 Paige, 213.*g*

So, injunctions have frequently been granted to stay the printing and selling of (*b*) almanacs, Bibles, and other books, in behalf of patentees and owners of such books; but the patent under seal is ever produced in open court.

2 Show. 258, vide infra, tit. *Prerogative*, (P 5.) (*b*) [In these cases it has been said, that the right must appear by the bill, and be admitted by the answer, else an injunction will not be granted till after the right has been determined at law. Anon. 1 Vern. 120; Hills v. University of Oxford, Ibid. 275; Jefferys v. Baldwin, Ambl. 164. ‖ 4 Burr. 2377, 2400; Whitchurch v. Hide, 2 Atk. 391; Blanchard v. Hill, Ibid. 485; Grierson v. Jackson, Ir. T. R. 304. But it is not to be received as an universal rule, that if the title is not clear at law, the court will not grant or sustain an injunction, until it is made so. For there are many instances in which the court has granted or sustained an injunction to the hearing, though the title has not been clear at law. "In the case of patent rights, if the party gets his patent, puts his invention into execution, and has proceeded to a sale, which may be called possession under it; however doubtful it may be, whether the patent can be sustained, possession under a colour of title is ground enough to enjoin, and to continue the injunction till it is proved at law, that it is only colour and not real title." Universities of Oxford and Cambridge v. Richardson, 6 Ves. 707, and the cases there referred to. See also Carnan v. Bowles, 2 Br. Ch. Rep. 84; Hicks v. Raincock, Dick. Ch. Ca. 647. Besides, where there is a fair doubt, as to the plaintiff's legal title; the court, while it directs it to be tried, provides in the interim for the benefit of both parties, by permitting the sale, on the defendant's undertaking to account according to the result of the action. Wilkins v. Aikin, 17 Ves. 424. The object of a court of equity in the exercise of its jurisdiction in subjects of this nature being to give full effect to the legal right, it follows, that if the publication be of such a nature, that no action at law can be maintained upon it, the injunction cannot be granted, even though there be a submission in the answer. Walcot v. Walker, 7 Ves. 1; Southey v. Sherwood, 2 Mer. 435.‖ *Qu.* whether in a bill to restrain the publication of a print or engraving under the 8 Geo. 2, c. 13, it be not necessary to state that the requisition of the statute was complied with with respect to the insertion on the plate and prints of the date of publication, and name of the proprietor? Blackwell v. Harper, 2 Atk. 93; 3 Barnard. 210; Harrison v. Hogg, 2 Ves. jun. 323; Thompson v. Symonds, 5 T. R. 41; Roworth v. Wilkes, 1 Campb. N. P. 94. ‖ The act of 7 Geo. 3, c. 38, extends to prints taken from any picture, drawing, model, or sculpture, either ancient or mo-

dern, and enlarges the right to twenty-eight years, without requiring any name to appear on the print. In the case of Beckford v. Hood, 7 T. R. 620, it was holden, that an author, whose work is pirated, may maintain an action on the case for damages, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed.‖ If a plaintiff fail in establishing his right to the *whole* of a publication, he may nevertheless have an injunction as to part. Carnan v. Bowles, 2 Br. Ch. Rep. 80; Cary v. Longman, 1 East, 358; Mason v. Murray, Ibid. 360. And if an author has sold *all his interest in the copyright*, he has no resulting right at the end of the first fourteen years, as against his own assignee, and will be enjoined from re-publishing. Ib. Ibid.]

[So, injunctions have been granted to restrain the receiver of letters from publishing them without the consent of the writer or of his personal representatives.

Pope v. Curl, 2 Atk. 542; Thompson v. Stanhope, Ambl. 737; Earl of Granard v. Dunkin, 1 Ball & Beatt. 207. See Lord and Lady Perceval v. Phipps, 2 Ves. & Beam. 19;] βDenis v. Leclerk, 1 Mart. Lo. R. 297.ℊ

{And to restrain the publishing of a magazine as a continuation of the plaintiff's magazine in numbers, and of communications from correspondents received by the defendant while publishing for the plaintiff; but not to prevent the publication of an original work of the same nature, and with a similar title.

8 Ves. J. 215, Hogg v. Kirby.}

‖So, to restrain the publication of works surreptitiously procured.

Cases of Mr. Webb and Mr. Forrester, cited in Ambl. 694.

So, to restrain the publication of a play taken in short hand from the mouth of the performers.

Macklin v. Richardson, Ambl. 694.

So, to restrain the sale of a work, which, though not the same as one already published, was represented as the same.

Hogg v. Kirby, 8 Ves. 215.

So, it has been granted until answer or further orders, to restrain the publication of a work in the plaintiff's name, or as his work, upon affidavit by the plaintiff's agents (he himself being abroad,) of circumstances making it highly probable that it was not the plaintiff's work, and the defendant declining to swear as to his belief that it actually was so.

Lord Byron v. Johnston, 2 Mer. 29.

So, to restrain the publication of an East India calendar, or directory, for though a copyright cannot subsist in it, as a general subject, any more than in a map, chart, series of chronology, &c., yet it may in the individual work; and where it can be traced, that another work on the same subject is, not an original compilation, but a mere copy with colourable variations, it will be protected by injunction.

Matthewson v. Stockdale, 12 Ves. 270; Longman v. Winchester, 16 Ves. 269.

So, to restrain the publication of translations; for these are as much the subject of copyright as original compositions; whether the right be acquired by the personal exertion of the plaintiff himself, or by purchase, or gift.

Wyatt v. Barnard, 3 Ves. and Beam. 77.

So, to restrain the publication of copies of any new print or drawing, though taken from nature; for the act of 8 G. 2, c. 13, is not confined to invention, but embraces every copy from nature.

Blackwell v. Harper, 2 Atk. 23; Barnardist. Ch. Rep. 210, S. C. βA made a copy of a print invented by B, in colours and of larger dimensions, and exhibited it as a dio-

rama. The court refused to restrain the exhibition until the right had been established at law. Martin v. Wright, 6 Sim. 297.*g*

So, where the House of Lords had exclusively appointed a person to print a trial before that house, an injunction until the hearing was granted to restrain the publication of it by another person.

Gurney v. Longman, 13 Ves. 493; Bathurst v. Kearsley, in Chancery, East, 1776.‖

[But the court will not interpose in this matter to restrain the publication of a real and fair abridgment of a new book: *secùs*, if only colourable.

Gyles v. Wylcox, 2 Atk. 141; Lofft's Rep. 775; Bell v. Walker, 1 Br. Ch. Rep. 451; Butterworth v. Robinson, 5 Ves. 709; Dodsley v. Kinnersley, Ambl. 403.] {1 Bro. C. C. 451, Bell v. Walker; 5 Ves. J. 709, Butterworth v. Robinson.}

β An injunction will be granted to protect the copyright of the assignee of the author, though it appears that at the time of the alleged piracy there was not an assignment in writing, and that the assignee had a merely equitable title.

Hodges v. Welsh, 2 Irish Eq. 266.

An injunction will lie to restrain a defendant from assuming the name of the complainant's newspaper, for the fraudulent purpose of imposing upon the public, and of supplanting him in the good will of his paper.

Bell v. Locke, 8 Paige, 75.*g*

‖ If several booksellers have taken copies of a spurious edition for sale, the proprietor of the copyright must file a separate bill against each.

Dilly v. Doig, 2 Ves. jun. 486.‖

Injunctions may be granted occasionally even for the purpose of restraining matters of general utility, as, the carrying on of a particular trade, the working of a colliery, or the navigating of a ship; in these cases, however, the court will require a strict proof of the plaintiff's right to such relief; and he must have been guilty of no laches.

2 Ch. Ca. 165; 1 Vern. 127; 2 Ves. 112; Ambl. 209; 18 Ves. 115.

[An injunction too, it seems, will go to inhibit defendants from dissolving a commercial partnership.

Chavany v. Van Somer, in Canc. M. 11 G. 3; 3 Wooddes. 416, note p.

So, (*a*) to restrain a partner from receiving the partnership funds, he being in contempt.

(*a*) Read v. Bowers, 4 Br. Ch. Rep. 441.]

β Injunction granted to restrain the plaintiff from levying on the partnership goods, for a debt due by one of the partners who died before the writ was delivered to the sheriff.

Newell v. Townsend, 6 Sim. 419.*g*

[So, upon a certificate of bill filed, and affidavit to restrain a surviving partner from disposing of the joint stock, and receiving the outstanding debts, he being in embarrassed circumstances, and in prison, and misapplying the property.

Harry v. Schrorder, 8 Ves. 317. β As to injunctions against partners, see Anderson v. Wallace, 2 Moll. 540; Glassington v. Thwaites, 1 Sim. & Stu. 124.*g*

So, it has now become the practice to grant an injunction to stay waste, in cases of trespass; in former days it would have been refused, unless the trespass had grown to a nuisance. It is doubtful (*b*) whether even now it would be granted in a case of trespass, where the title is disputed.

Hanson v. Gardiner, 7 Ves. 307; Mogg v. Mogg, 2 Dick. 670. (*b*) Kinder v. Jones, 17 Ves. 110. See further, Crockford v. Alexander, 15 Ves. 138; Mitchell v. Dors,

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6 Ves. 147; Courthope v. Mapplesden, 10 Ves. 290; Twort v. Twort, 16 Ves. 130; Earl Cowper v. Baker, 17 Ves. 128; Thomas v. Oakley, 18 Ves. 184. β A motion for an injunction in the nature of estrepement to restrain waste, will not be entertained except where the title is clear. Lowe v. Lucy, 1 Irish Eq. 93.γ

βAn injunction in the nature of a writ of estrepement was granted for the purpose of preventing breaches of covenant.

Beamish v. Goold, 1 Craw. & Dix. 52.

Fixtures are embraced by a mortgage; and a bill against their removal may be filed.

Robinson v. Preswick, 3 Edw. 246.

An injunction to stay waste granted to a mortgagee, before the mortgage debt became due.

Murdock's case, 2 Bland, 461.

Although the defendants had appeared, an injunction to restrain the pulling down of houses will be granted on an *ex parte* motion.

Petty v. Eastern Counties R. R. Co., 8 Simm. 483.

A tenant holding premises by virtue of leases for 999 years will be restrained by injunction from so using those premises as to render them an insufficient remedy to the landlord for his rent.

Croley v. Matthew, 1 Craw. & Dix. 86. See Purcell v. Nash, 1 Jones's Exch. 625; S. C. 2 Jones's Exch. 116.

Where there has been a decree for the sale of an estate, an injunction may be granted to stay waste.

Tessier v. Wyse, 3 Bland, 29.γ

Injunctions are occasionally granted between tenants in common and coparceners; but this is not done but in cases of malicious destruction, or upon some special grounds.

Hole v. Thomas, 7 Ves. 580; Smellman v. Onions, 3 Br. Ch. Rep. 621; Twort v. Twort, 16 Ves. 130.‖ β Under special circumstances, an injunction was granted, on the application of a defendant, against a co-defendant. Edgecumbe v. Carpenter, 1 Beav. 171.γ

[Injunctions will also be granted to restrain the negotiation of bills of exchange, or promissory notes, obtained by fraud; and in this case, if the plaintiff support his motion, by an affidavit of the truth of the facts stated in his bill, the injunction, being considered in the nature of an injunction to stay waste, will be allowed immediately upon the bill being filed, lest the defendant should, upon intimation of the suit, by negotiating the security, defeat its object.

Patrick v. Harrison, 3 Br. Ch. Rep. 476; Fonbl. Eq. Tr. 38, note (x); —— v. Blackwood and others, Anstr. 851. β Osborn v. United States Bank, 9 Wheat. 738; Stead v. Clay, 1 Sim. 294; Wilson v. Wilson, 1 Desaus. 224.γ Where a motion was made to restrain a defendant either from bringing an action on a promissory note, suggested to have been given for undertaking to bring about a marriage, or to prevent him from assigning it over, the court made an order upon the defendant to keep the note in his own possession, and not to assign or endorse it over, but would not extend the injunction so far as to inhibit the payee himself from proceeding at law. Smith v. Aykwell, 3 Atk. 566; Ambl. 66, S. C. Where the acceptance of a bill of exchange had been declared void by the law of a foreign country, an injunction was granted to restrain the holders from suing the acceptor upon it in this country. Burroughs v. Jamineau, Mos. 1; Sel. Cas. in Ch. 69, S. C.] ‖ But the interference of the court in this summary way is not to be expected in cases of mere breach of contract, but only where the injury is immediate and irreparable. Longman and others v. Calliford, Anstr. 645; Johnson v. Goldswaine and others, Ibid. 749. But see Geast v. Lord Belfast, in Chancery, 1796, Ibid. On a trust to sell, a suggestion in the bill of improper conduct in the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction

before answer, to stop the sale. Pechel v. Fowler, Anstr. 549. Nor will an injunction be granted to prevent the transferring of stock until after the defendant has appeared, or is in contempt for non-appearance, and upon notice. Doolittle v. Walton, Dick. 442. But it has issued before the defendant had prayed time to answer, or was in contempt, to restrain him from selling diamonds, to which the plaintiff claimed title. Tonnins v. Prout, Dick. 387. To obtain it, however, it is necessary that the plaintiff should show a specific right in the property, and that it is in danger of being lost. Ximenes v. Franco, Ibid. 149.‖

‖ Where a party, having a legal right, and conusant of that right, stands by, and suffers another to act in opposition to it, upon an assumption of right in that other person, an injunction will issue to restrain him from insisting upon it afterwards, and defeating the act in which he has acquiesced.

E. I. Company v. Vincent, 2 Atk. 83; Stiles v. Cowper, 3 Atk. 692; Jackson v. Cator, 5 Ves. 688.‖ ℘ When a railway empowered by act of parliament are about to enter upon an individual's land, and by his silence and conduct he permits the company to carry on their works upon the supposition that they were entitled to enter on and take the land in question; the owner of such land is not entitled to an interlocutory injunction to restrain from so entering. Greenhalgh v. Manch. and Birm. R. R. Co., 3 My. & Craig, 788.℘

There is also an injunction granted to stay trial at law; this is never granted but upon notice; as, where one files his bill, and it appears to the court that the plaintiff's equity must arise out of the defendant's answer; in this case the court will, and often does, grant an injunction, and that the same may extend to stay trial. (*a*)

2 Ch. Cas. 66, 76, 93. (*a*) ‖ All that was formerly thought necessary in the affidavit to ground an application in common cases that the injunction may extend to stay trial was, that the party could not safely proceed to trial until the defendant had put in his answer. Hartley v. Hobson, Dick. 728; 2 Cox, 107, S. C. But it is now required that the affidavit shall go further, and state, that the plaintiff believes, that the answer will furnish discovery material to his defence at law. Partington v. Hobson, 16 Ves. 220; Appleyard v. Seton, Ibid. 223. And an injunction will not be extended to stay trial just at the time of the assizes, unless the party will give security for the costs. Blacoe v. Wilkinson, 13 Ves. 454.‖

℘ When one of the defendants to a bill of interpleader is suing the plaintiff in equity, and another suing him at law, the court will grant an injunction to restrain the suit in equity, as well as the action at law.

Crawford v. Fisher, 10 Sim. 479.℘

[An injunction to stay trial may be granted before appearance: but an injunction to stay trial and also execution cannot be moved for at one and the same time. Wright, an executor, being defendant in a suit in Chancery, wherein creditors were the plaintiffs, was afterwards sued at law by Braine, another creditor, who gave notice of trial in his action. Wright now filed his bill against Braine, and before appearance, moved for an injunction to stay execution, and that it should also stay trial, the notice of trial being for Thursday then next. Lord Thurlow said, that they could not be granted as one motion, and therefore granted the first part only.

Wright v. Braine, MSS.——3 Br. Ch. Rep. 87, S. C.; 2 Cox, 232, S. C. The regular course is, first to get the common injunction, for want of appearance, and then to move, that it may be extended to stay trial.] ‖The meaning of this case, as Lord Eldon said, must have been, that you cannot move on the same day for the common injunction for want of an answer, and for the special injunction to stay trial. Garlick v. Pearson, 10 Ves. 451. Special injunctions to restrain proceedings at law are granted in those circumstances only, where the party has not had any opportunity of obtaining the common injunction. Franklin v. Thomas, 3 Mer. 225. As, upon judgments entered up upon old warrants of attorney, &c. Annesley v. Rookes, Ibid. 226, n. Where the defendant (plaintiff at law) had, on the day when the common injunction might otherwise have been obtained, put in a demurrer, which was over-ruled; but in

the mean time, pending the demurrer, the plaintiff (defendant at law) was taken in execution; after which, and immediately upon the overruling of the demurrer, the common injunction was obtained; the court was applied to to discharge the plaintiff out of custody, on the ground that the demurrer being overruled, the parties were entitled to be placed in the situation they would have been in if no demurrer had been filed, and by analogy to the case of goods taken in execution. But to this it was answered, that the parties would not, by granting it, be placed in the situation in which they would otherwise have stood, inasmuch as the judgment had been satisfied by the taking of the plaintiff in execution; and if he should now be released, he could never be taken again, and the debt would be gone. The court ordered the plaintiff to be discharged upon undertaking to confess judgment, so that he might not afterwards say, that the existing judgment and debt had been satisfied by the execution from which he was then discharged. Id. Ibid.‖

‖ An injunction will issue as well where mischief is merely threatened, as where it has been actually committed. For the right to the injunction does not depend upon the right to an account; courts of equity taking this jurisdiction not as incident to accounts, but from the writ of prohibition of waste.

6 Ves. 705; Dick. 455, 645, 670.‖ ℘ Spooner v. M'Connell, 1 M'Lean, 338; Mayor, &c. of Rochester v. Curtiss, 1 Clarke, 336.℘

There is an injunction called a perpetual injunction, for quieting a man in the possession of his estate: this is generally either upon a plain equitable title, or where one, two, or more verdicts have gone against a man; this injunction is to quiet the plaintiff and his heirs for ever, and all claiming by, from, or under him; and it is very often granted, and in many instances the justice of the court calls for it.

[Lowe v. Jolliffe, Dick. 388. ℘ Brinckerhoff v. Lansing, 4 Johns. Ch. 69; Bushnell v. Harford, 4 Johns. Ch. 302; Kruson v. Kruson, 1 Bibb. 184; Hill v. Bowis, 1 Bland, 594; Beauchamp v. Marquis of Huntley, Jac. R. 546; Dunlap v. Stetson, 4 Mason, 349; Whyte v. O'Brien, 1 Sim. & Stu. 551; Crawford v. Crawford, 4 Desaus. 176; Wilson v. Robertson, 1 Tenn. 266.℘ There is one instance of an injunction to be quieted in possession being granted, though the title at law was not established. Bush v. Western, Pre. Ch. 530. But in later cases, it hath been refused. Birch v. Holt, 3 Atk. 726, Anon., 2 Ves. 414; Weller v. Smeaton, 1 Cox, 102.] ‖ Indeed a right is not considered to be determined so as to be a ground for a perpetual injunction by *one* trial at law, unless upon an issue sent out of the court for the purpose. Robinson v. Lord Byron, 2 Cox, 4. The court never grants a perpetual injunction before the hearing. 3 Ves. & Beam. 172.‖

℘ It seems that a perpetual injunction to stay proceedings at law is allowed only in two cases; 1. When the plaintiff has already satisfactorily established his right at law, and, 2. When the persons who controvert it are so numerous as to render an issue, under the direction of the court, indispensable to the parties concerned, and to prevent a multiplicity of suits.

Eldridge v. Hill, 2 Johns. Ch. 282.℘

Also, it has been attempted in Chancery, after three or four ejectments, by a bill of peace to establish the prevailing party's title. But this has been constantly denied, where the title was merely at law; and my Lord Cowper's reasons herein were, that it would be too great arrogance in him to alter the course of the law; for that every termor may have an ejectment; and every new ejectment supposes a new demise, and the costs in ejectment are a recompense for the trouble and charges to which the possessor is put. But, where the suit begins in Chancery, for relief touching pretended encumbrances on the title of lands, and the court hath ordered the plaintiff to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, the court hath ordered a perpetual injunction against the defendant, because, there, the suit is first

attached in tna court, and never began at law; and such precedent encum brances appearing to be fraudulent and inequitable against the possessor, it is within the compass of the court to relieve against them.

Pr. Ch. 261; Lord Bath v. Sherwin, Gilb. Eq. Rep. 2, S. C. [But in this case Lord Cowper's decree was reversed in the House of Lords, and a perpetual injunction granted. 1 Br. P. C. 266. And in later times, these injunctions have been granted with less reserve. Leighton v. Leighton, 1 P. Wms. 671; 1 Str. 404; 2 Br. P. C. 217; Barefoot v. Fry, Bunb. 158. It is said also, that where a bill in equity is taken *pro confesso*, by reason of the defendant's contempt in disobeying all process, if the suit be to quiet a possession, or to stay proceedings at law, the court will decree a perpetual injunction. Pr. Reg. c. 197. So, where an issue was directed out of Chancery, to try the validity of a will of personalty, and the verdict was given against it, the court granted a perpetual injunction against proving it before the ecclesiastical judge. Beversham v. Springhold, 1 Ch. Ca. 80. See Montgomery v. Clark, 2 Atk. 379. So, where the party concerned in interest *admitted* the probate of a will, he was enjoined from contesting it in the ecclesiastical court, for facts are as properly concluded by admission as by a trial. Sheffield v. Duchess of Buckingham, 1 Atk. 628.]

‖ If after a decree establishing a will, and directing the trusts to be performed, and the devisee to be put in possession of the estates, the heir-at-law bring an ejectment; or, if after a decree on a bill brought by creditors on behalf of themselves and the rest of the creditors, for an account of what is due to the creditors, an advertisement for creditors to come in by a day to be fixed, or to be excluded, and an account of assets and application of such assets, a creditor take any legal method for the recovery of his debt; in either of these cases a perpetual injunction will issue; for the court will not permit any person to impede the execution of a decree, so long as it remains unappealed from. But the court cannot stop a creditor at law, unless there is a decree under which he can go in.

Selby v. Selby, Dick. 682; Douglas v. Clay, Ibid. 393; Brooke v. Reynolds, Ibid. 603; 1 Br. Ch. Rep. 183, S. C.; Kenyon v. Worthington, Dick. 668. After a general decree against an executor to account, &c., a creditor will be restrained by injunction from proceeding at law; not only staying execution, but from going to trial. Goate v. Fryer, 2 Cox. 199; Rush v. Higgs, 4 Ves. 638.‖

A trustee having contracted to sell an estate to one person, and the *cestui que trust* having actually sold it to another, who moved for an injunction to quiet him in the possession, being disturbed by the trustee; it was holden by my lord keeper, that an injunction for quieting the possession is only grantable where the plaintiff has been in possession for the space of three years before the bill exhibited, (*a*) upon a title yet undetermined, or in case the cause hath been heard, and judgment passed by the court upon the merits.

Vern. 156, Lady Poine's case. (*a*) [The injunction in this case is drawn from the equity of the statutes upon forcible entries. 2 Ves. 415.]

There is an injunction to prevent multiplicity of suits; as, where many suits are depending, and are likely to happen, from one and the same thing, the court will here interpose, and grant an injunction; they will direct a proper issue to try the whole, and all the rest shall be bound by the verdict; else there might be twenty actions, and as many verdicts, where one (*b*) proper direction or issue ends the whole; and it is only directing one issue to prevent many more.

Vern. 22, 266, 293; Show. P. C. 17. (*b*) As where several tenants of a manor claim the profits of a fair. 1 Vern. 266.—So, to settle the boundaries of lands. Pr. Ch. 261.

If a person is sued at law for irregularly serving the process of the Court of Chancery, it is said, that an injunction will be granted to stay the proceedings at law; for the irregularity is only punishable in that court.

Bailey v. Devereux, Vern. 269. ‖A motion was afterwards made on the part of the

defendant to dissolve an injunction, which the plaintiff had obtained. And the order from the registrar's book appears to be, "that the irregularity of the proceeding be referred to be examined by the master, who is to certify the same;" and it was further ordered, "that the defendant should be at liberty to proceed to trial, unless cause shown on a given short day, and the defendant in the mean time is at liberty to prepare for trial." R. L. 1684, A. fol. 36. No further entry appears.‖ ℘A decree in Chancery was reversed on the ground of fraud in obtaining it, and the party injured being restored to his former situation, brought an action at law to recover damages for the fraud, an injunction against that action was refused, on an application made for the purpose by the adverse party. Peck v. Woodbridge, 3 Day, 508.℘

℘A perpetual injunction was granted, in order to stay proceeding on a judgment at law, obtained in a suit in the name of a person not interested, whose name was used to prevent a defence against the real plaintiff in interest.

Greenleaf v. Maher, 2 Wash. C. C. R. 393.℘

Where two courts have a concurrent jurisdiction of the same thing, that court shall retain the cause which is first possessed of it; as between the Exchequer and Chancery, the Counties Palatine and Chancery: but, if legacies are given to infant children by a stranger, and their father, being appointed their guardian by the spiritual court, sues the executor there for recovery of them, Chancery will grant an injunction against his proceeding in that court; because the spiritual court cannot order the legacies to be put out at interest for the children's benefit, as the Chancery may do, though they may compel the father to give good security with good sureties. So, where a husband sues in the spiritual court for a legacy given his wife, an injunction will be awarded, because that court cannot compel him to make an adequate settlement or provision for his wife; but, if the executor be ordered by such a time to bring in the money, which he neglects to do, no injunction will be granted, because the bill might have been brought only for delay, and the executor might at any time be pleased to dismiss his own bill.

[3 Atk. 629; Pr. Ch. 548; 2 Atk. 420. ‖Dick. 373; Meake v. Meake, 5 Ves. 517, note 1; Dick. 373, S. C.‖ In the case of Montgomery v. Clark, 2 Atk. 378, where a will, consisting of real and personal estate, which had been set aside at law for the insanity of the testator, was litigated in the ecclesiastical court, Lord Hardwicke is reported to have holden, that the Court of Chancery had no power to interpose, so as to stop the proceedings in the spiritual court. But see Sheffield v. Duchess of Buckingham, 1 Atk. 628, *supr.*—In the case of legacies, where the ecclesiastical court have clearly an original jurisdiction, if there be a trust, or any thing in the nature of a trust, the Court of Chancery will grant an injunction, trusts being proper only for the cognisance of that court. 1 Atk. 491. On a bill to establish a *modus*, the Court of Exchequer will inhibit the spiritual court, though the plaintiff in equity have not pleaded to the libel, as that court is not competent to try the *modus*. Blacket v. Finney, Bunb. 176; Salmon v. Rake, Ibid. But courts of equity do not grant an injunction where the ecclesiastical court proceeds without jurisdiction, unless there are some equitable circumstances between the parties. An injunction supposes the ecclesiastical court to have jurisdiction: a want of jurisdiction is a ground for a prohibition. 1 Atk. 630; Barnardist. Ch. Rep. 29.]

‖ Injunctions are occasionally granted to restrain legatees from proceeding in the spiritual court for legacies, until the hearing of the cause.

Stonehouse v. Stonehouse, Dick. 98; Smith v. Kempson, Ibid. 769.‖

There are other injunctions which are never denied; as in an ejectment, where the party agrees to give judgment in ejectment to prevent trial, to give a release of errors, and to consent not to bring a writ of error, and to this it is sometimes added, to deliver possession, as the court upon hearing

shall direct; this forwards the defendant at law, and he could have no more if he were to proceed to trial.

Where a mortgagee of a manor, to which an advowson was appendant, brought a bill to foreclose, and, pending the suit, the church became void, and the mortgagee, being hindered from presenting, brought his *quare impedit*; (*a*) though the mortgagor had no bill filed, yet being ready and offering to pay the principal, interest, and costs, if the mortgagee will not accept his money, interest shall cease, and an injunction to stay proceedings in the *quare impedit* be granted; for the mortgagee, till a foreclosure, is but in nature of a trustee for the mortgagor.

2 Vern. 401, Amherst v. Dawling, 1 Eq. Ca. Ab. 229, S. C. (*a*) An injunction is never to be granted before bill filed. 4 Inst. 92. ‖ One of the articles against Cardinal Wolsey was, "that he had granted many injunctions by writ, and the parties never called thereunto, nor bill put in against them." In pressing cases it will be granted upon petition and affidavit before bill filed. But, where this is admitted, an injunction only can be had, for the chancellor cannot order any thing to be done on petition. Mayor, &c. of London v. Bolt, 5 Ves. 130. In injunction to inhibit waste, or to stay proceedings at law, the stat. 4 Ann. c. 16, § 22, allows the subpœna to issue before the bill is filed. There is an express order, very ancient, that an injunction shall not be obtained except by motion in open court, 10 Ves. 452; yet it is often had, from the necessity of the case, in vacation, and at the lord chancellor's house. Nicholas v. Kearsley, 2 Dick. 645; Temple v. Bank of England, 661. The Court of Chancery is always open.‖

Where a cause abated by the death of the Lady Gerard, and the defendant was her executor, and being served with a copy of the bill of revivor, and my lord keeper's letter, would not appear, being in privilege; upon motion an injunction was granted, though the cause was not revived; and the case of Armstrong and Jackson was cited, where before a demurrer determined, the plaintiff had an injunction on motion.

Abr. Eq. 285, Duke Hamilton v. Macclesfield.

So, where the Lord Wharton had an injunction to quiet him in the possession of the mines in question, and upon the hearing of the cause an issue was directed to try, whether the mines in question were within the plaintiff's or defendant's manor; the issue was tried at bar, and found for the plaintiff; then the plaintiff died, and a bill of revivor was brought, and before the time for answering was out, or the cause revived, the plaintiff moved for an injunction to stay the Lord Wharton's working the mines, having affidavits that since the verdict against him he had trebled the number of workmen, and between that and Candlemas would work out the mines; and an injunction was granted, though the cause was not revived.

Abr. Eq. 285, Robinson and Ld. Wharton.

[Where a bill by a principal debtor for an injunction is dismissed, the bail cannot bring another upon the same equity. If indeed there is collusion, or a charge of collusion in the bill between the principal and the plaintiff at law, and the injunction is dissolved by collusion in order to charge the bail at law, the bail might take up the equity: but it would be then a new equity; for fraud and collusion affect every thing, and would give a right to resort to the original equity.

Anon. 2 Ves. 630.

An injunction to stay proceedings against the principal extends to proceedings against the bail; and where bail is only put in below, to proceedings on the bail-bond.

Stone v. Tuffin, Ambl. 32; Bolt v. Stanway, 2 Anstr. 556; Bullen v. Ovey, 16 Ves. 141; Leonard v. Attwell, 17 Ves. 385.]

(A) Of the several Kinds of Injunctions

ß An injunction may be granted to restrain the proceedings of a court of common law, at any stage of such proceedings.

Albritton v. Bird, R. M. Charl. 93.

A judgment at law may be enjoined in part.

Lyles v. Hatton, 6 Gill. & Johns. 122; Bell v. Cunningnam, 1 Sumn. 89.ℊ

‖ Where an award has been made a rule of a court of law under the statute of 8 & 9 W. 3, c. 15, it is not competent to the chancellor to stay by injunction the process of that court upon such award. An award made under this statute differs very materially from an award made in the course of a cause.

Gwinett v. Bannister, 14 Ves. 530.‖

[Regularly, it seems, a proper writ of injunction cannot be granted unless expressly prayed by the bill; for the prayer of general relief will not extend to an injunction. If however the injunction issue upon such a general prayer, and the defendant put in his answer, and move in the common form, that upon the coming in of the answer, the injunction may be dissolved, this is a submission to the regularity of the injunction, and will cure the original defect.

Savory v. Dyer, Ambl. 70; Davila v. Peacock, 1 Barnardist. Ch. Rep. 27. In special cases an injunction hath been granted, though no bill hath been filed. Amhurst v. Dawling, 2 Vern. 401.

When an injunction is dissolved on the merits, and the plaintiff amends his bill, or files a supplemental bill for the same matter, he cannot of course move for an injunction till answer; though upon special motion, ‖ supported by an affidavit of the facts stated in the amended bill, he may obtain it, provided there be some default in the defendant, either by not appearing or not answering; the time in either instance having expired. By amending the bill, the injunction is gone, unless it is sustained by the terms of the order, expressing, that it is to be without prejudice to the injunction.

Anon. 3 Atk. 694; Travers v. Lord Stafford, Ambl. 104; 2 Ves. 19; Edwards v. Jenkins, 3 Br. Ch. Rep. 425; Gadd v. Worral, Anstr. 553; James v. Downes, 18 Ves. 522; Vipen v. Mortlock, 1 Mer. 476; Lingham v. Fowle, Anstr. 188; Bliss v. Boscawen, 2 Ves. & Beam. 101.

But, if the bill be amended after exceptions allowed and not answered, it does not affect the injunction at all; and therefore the words "without prejudice to the injunction" are unnecessary in the application for leave to amend. But, if exceptions (*a*) are taken, and before the arguing of them the motion to amend is made, it is necessary to make it a term of that motion, that the amendments shall be without prejudice to the injunction. For it is irregular to obtain an order to amend the bill until the exceptions are disposed of; because, by exceptions, the defendant is deprived of moving on his answer to dissolve the injunction; and therefore the plaintiff shall not indirectly give himself an opportunity of amending, without a special order, that such amendment shall be without prejudice to the injunction.

Dipper v. Durant, 3 Mer. 465; Adney v. Flood, Madd. 449. (*a*) Dixon v. Redmond 2 Sch. & Lefr. 515.

After a defendant to an injunction bill has put in an answer, upon which plaintiff has neither moved nor excepted, the general rule is, that he cannot have an injunction upon an amended bill and affidavit. But, there may be cases of exception to this rule; as, where the plaintiff has come to the knowledge of circumstances subsequently to the filing of the original bill, or the like.

Norris v. Kennedy, 11 Ves. 565.‖

(A) Of the several Kinds of Injunctions.

[The practice of a court of law in compelling a plaintiff on a bond not to take out execution beyond his real debt, does not oust the jurisdiction of courts of equity in awarding an injunction.

Codd v. Woden, 3 Br. Ch. Rep. 73.

Where a bill is referred for impertinence before the time for answering is out, the plaintiff is not, upon the expiration of the time, entitled to the injunction as of course for want of an answer, but must move it upon notice and affidavit of circumstances.

Neale v. Wadeson, 1 Br. Ch. Rep. 574.

An ejectment was brought by a person abroad to recover an estate as devisee against the heir at law; the heir thereupon filed a bill, charging fraud in the manner of obtaining the will, by the devisee and other defendants in the cause; and moved for an injunction to stay proceedings in the ejectment till the coming in of the answer, upon an affidavit charging fraud in the defendants generally, but not particularizing the plaintiff at law, who was abroad. The lord chancellor was of opinion, that when the defendant was here, and could put in his answer easily, the general form was sufficient; but, when the defendant was abroad, there should be a special ground to show that the discovery from him was material.

Revet v. Braham, 2 Br. Ch. Rep. 640. ℔ Vide Read v. Consequa, 4 Wash. C. C. R. 174; Thompson v. Allen, 2 Hayw. 151.℈

Where the plaintiff at law is abroad, ‖ a motion that service of the subpœna upon the attorney shall be good service must be accompanied with an affidavit of merits. And where a verdict has been obtained at law, and an injunction bill is filed while the plaintiff at law is out of the kingdom, and an injunction obtained against him for want of his answer, the court will direct the plaintiff in equity to pay into court the money recovered, and in default thereof will dissolve the injunction.

Delancy v. Wallis, 3 Br. Ch. Rep. 12; Stephen v. Cini, 4 Ves. 359; Fullarton v. Lady Wallace, Ibid. 360; Potts v. Butler, 1 Cox, 330; ℔ Read v. Consequa, 4 Wash C. C. R. 174.℈

And where the defendant is abroad, an injunction cannot be had until appearance, or default of appearance.

Anderson v. Darcy, 18 Ves. 447; White v. Klevers, Ibid. 471.‖

[In common cases, affidavits cannot be read against the defendant's answer in order to obtain an injunction. But this rule does not hold where irreparable mischief would follow from the delay of entering into the plaintiff's case till the hearing, as in cases of waste, patents, fraud, &c.

Isaacs v. Humphage, 3 Br. Ch. Rep. 463, and the cases there cited. 1 Ves. jun. 427, S. C.; Sommerville v. Buckler, Anstr. 658; Packington v. Packington, Dick. 101.]

{And if an injunction is dissolved on the answer being put in, it will not be revived because an indictment for perjury in the answer has been found by a grand jury.

8 Ves. J. 36, Clapham v. White; 9 Ves. J. 335, Berkely v. Brymer.}

‖A defendant cannot prevent the injunction by entering an appearance one day before the motion is made. *Secùs*, perhaps, if he appear time enough to enable the plaintiff to give notice.

Aller v. Jones, 15 Ves. 605.‖

℔ Counsel will be restrained by injunction from divulging the secrets of a former client.

Carter v. Palmer, 1 Irish Eq. 21; Evett v. Price, 1 Sim. 483. But see Beer v. Ward, Jac. 77.

(A) Of the several Kinds of Injunctions.

Injunction granted to restrain a solicitor who had sold his business on those terms, from practising in any part of Great Britain, and from endeavouring to induce any persons who were clients of the former and present firm, to cease to employ the latter as their attorneys or solicitors.

Whittaker v. Howe, 3 Beav. 383.

Where the bill shows a probable right, and a probable danger to such right, without the special interposition of the court, an injunction will be granted.

Read v. Dews, R. M. Charl. 358.

An injunction was granted to prevent the obstruction of ancient lights against a lessee of an ecclesiastical corporation, subject to the plaintiff's establishing their right of easement in an action.

Sutton v. Montfort, 4 Simm. 559. See Buck v. Stacy, 2 Russ. 121.

An injunction will not be granted to restrain an individual from making an improvement on his own premises upon the ground that it cannot be made without endangering an edifice erected on the adjacent premises, if the owner of the adjacent premises does not possess any special privileges protecting him from the consequences of such improvement.

Losala v. Holbrook, 4 Paige, 169.

An injunction lies to restrain the infringement of a privilege granted by statute; for example, to prevent persons running steamboats within the state of New York, contrary to the privilege granted to Livingston and Fulton.

Livingston v. Ogden, 4 Johns. Ch. 48. See Ogden v. Gibbons, 4 Johns. Ch. 150, S. C.; 17 Johns. 438; North River Company v. Hoffman, 5 Johns. Ch. 300.

An injunction was granted to restrain the corporation of the city of New York, from entering upon, digging, throwing down and destroying ground possessed by the plaintiff, until they shall have established their right to the ground by due course of law.

Varrick v. The Corporation of New York, 4 Johns. Ch. 53.

A perpetual injunction lies to restrain proceedings on a judgment which nas been satisfied.

Brimkerhoff v. Lansing, 4 Johns. Ch. 69.

Where an individual has a grant of a ferry, bridge, or road, with the exclusive right of taking toll, and another ferry, bridge, or road is made so near as to create a competition injurious to the franchise, a perpetual injunction to secure the use of such franchise, and restrain the use of the rival establishment, will be granted.

Newburg Turnpike Company v. Miller, 5 Johns. Ch. 111.

Where slaves are improperly taken in execution, the court of equity will in general afford relief to prevent their sale,(*a*) but no injunction will be granted unless the circumstances of the case render the remedy at law inadequate.(*b*)

(*a*) Randolph v. Randolph, 6 Rand. 194. (*b*) Kendrick v. Arnold, 4 Bibb, 236; Lansing v. Eddy, 1 Johns. Ch. 49.

On a bill for discovery, on a charge of usury, an injunction will not be granted to stay the proceedings at law on the usurious contract, unless the plaintiff in his bill tenders, or brings into court, the money actually borrowed by him, and its lawful interest.

Rogers v. Rathbun, 1 Johns. Ch. 367.

(A) Of the several Kinds of Injunctions.

A court of the United States has no jurisdiction to grant an injunction to stay proceedings at law in a state court.

Diggs v. Wolcott, 4 Cranch, 179.

A state court may enjoin the marshal of the United States from seizing under an execution from a court of the United States, property which the plaintiff in the injunction claims as his.

Dunn and wife v. Vail, 7 Mart. Lo. R. 436. See vide M'Keen v. Voorhees, 7 Cranch, 279.

A court of one district may, at the suit of a person claiming to be the owner of property in that district, and which he alleges to have been erroneously seized as belonging to a defendant in an execution issued in another district, enjoin the sheriff from seizing such property.

Cavelier v. Turnbull's heirs, 8 Mart. Lo. R. 61.

A perpetual injunction to a judgment in slander will be granted on the ground that at the time of speaking the defamatory words, and when the judgment was obtained, the complainant in the bill, who was defendant at law, was insane, or in a state of partial mental derangement on the subject to which those words related.

Horner v. Marshall's adm'x., 5 Munf. 466.

‖A judge at *nisi prius* will not take a cause out of its proper course, in order to avoid the effect of an injunction which is about to be granted, though the injunction is not upon the merits.

Goldschmidt v. Marryatt, 1 Camp. R. 559. As to the motion to extend the common injunction to *stay trial*, (vide note, p. 195,) it is now settled that to ground such motion, the plaintiff in equity must swear that he believes the answer will furnish discovery material to the defence at law. Appleyard v. Seton, 16 Ves. 223; White v. Steinwacks, 19 Ves. 84; Bishton v. Birch, 2 Ves. & Bea. 41; Killing v. Killing, Eden on Inj. 84; Rodenhurst v. Tudman, 1 Turner & Russ. 305; and that it is not enough, as formerly held, Partington v. Hobson, 16 Ves. R. 220; Nelthorpe v. Law, 13 Ves. 323, to swear that he cannot safely go to trial without the answer. Although the answers are come in, yet if the plaintiff in equity has got a commission to examine witnesses, he is entitled to the injunction to stay trial till the return of the commission. White v. Steinwacks, 19 Ves. 84. If the application is made immediately before the assizes, or there has been any laches in the plaintiff in equity, the application will be refused. Blacoe v. Wilkinson, 13 Ves. 454; Field v. Beaumont, 3 Madd. 102; 1 Swanst. 204. The application may be made, although by the rules of the court the defendant must put in his answer before the trial can take place. Taylor v. Leigh, 2 Jac. & W. 388. An answer filed is a sufficient objection to the motion; but if the defendant submit to exceptions the order will be made, an insufficient answer being as no answer. Bishton v. Birch, 1 Ves. & Bea. 366. To prevent the motion the answer must be filed on the evening before the seal day at latest. Whitehouse v. Hickman, 1 Sim. & Stu. 102. Under special circumstances the motion may be made without first obtaining the common injunction. Raphael v. Birdwood, 3 Meriv. R. 229, n. And the plaintiff in a bill of interpleader may move at once for a special injunction on payment of money into court without first obtaining the common injunction. Vicary v. Widger, 1 Sim. R. 15.

The court granted an injunction principally on the ground of the alteration made in the property; viz., in converting a private house into a shop for the purpose of a coachmaker's business.

Bannister v. Sadler, 14 Ves. 526; and see Eden on Inj. ch. 8.

As neither a customary tenant without leave of the lord, nor the lord without license from the copyholder, can open and work new mines (without a special custom,) an injunction will be granted against a lord preparing to open a mine and dig for coal on the land of a copyholder.

Grey v. Duke of Northumberland, 13 Ves. 236; 17 Ves. 281.

(A) Of the several Kinds of Injunctions

A court of equity, considering the peculiar nature of mining concerns, in which an immense expenditure is required to *renew* operations which have once been stopped, will rarely interpose by injunction till the right has been established at law; and it will be particularly unwilling to lend its assistance where the defendant happens to be tenant for life under a settlement, and if it does will not continue the injunction without securing the means of a speedy trial. It will also refuse to interpose if the plaintiff has been guilty of *laches*, since persons will frequently stand by and see expenditure incurred, and if it turns out profitable set up their claim, if otherwise they will have nothing to do with it.

Grey v. Duke of Northumberland, 13 Ves. 236; 17 Ves. 281; Birmingham Canal Company v. Lloyd, 18 Ves. 515; and see 19 Ves. 159.

An injunction may be granted to restrain permissive as well as voluntary waste.

Caldwall v. Baylis, 2 Meriv. 408.

An injunction will be granted to restrain tenant for life from committing waste, though she be construed tenant for life contrary to probable intention of the testator but according to the settled construction of precatory words in a will: the devise being to A. and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family." The devisee being held tenant for life, the consequence must follow that she is impeachable of waste.

Wright v. Atkyns, 1 Ves. & Bea. 313.

It is settled that trustees to support contingent remainders may file a bill for an injunction to stay waste.

Garth v. Cotton, 1 Dick. 183; Stansfield v. Habergham, 10 Ves. 273; and see 2 Madd. R. 137.

A lease renewable for ever in Ireland is regarded so much as a perpetuity, that Lord Redesdale refused an injunction to restrain a tenant from cutting timber.

Calvert v. Gason, 2 Scho. & Lef. 561.

As to ornamental timber, (see p. 197,) the principle of protecting it by injunction has lately been held to extend to trees planted for excluding objects from the view.

view.

Day v. Merry, 16 Ves. 375. Ibid. 185.

The court only protects timber *which has been planted for ornament*, and will not act on affidavits simply stating that the timber *is* ornamental.

Lord Mahon v. Lord Stanhope, 3 Madd. R. 523.

In a late case the doctrine of equitable waste was much discussed and considered; and the vice-chancellor held, that a tenant in tail was not liable to be restrained from cutting timber to any extent, on the mere ground that he was by act of parliament prevented from barring his issue and those in remainder as an ordinary tenant in tail may do. But the tenant in tail (the Duke of Marlborough) being by the 5 Ann. c. 3, bound to maintain Blenheim house, the vice-chancellor held, that he was consequently not at liberty to cut trees which were essential to its ornament or shelter.

Attorney-General v. Duke of Marlborough, 3 Madd. 498.

Though it has become the practice to grant injunctions for waste in cases of trespass without privity of estate, this will not be granted where the title of the plaintiff is disputed. (See p. 200.)

Smith v. Collyer, 8 Ves. 89; Pilsworth v. Hopton, 6 Ves. 51; 19 Ibid. 147; Lee v. Lee, 54 Harg. MSS. 158; but see Sir W. Grant's observations, 3 Meriv. 173.

(A) Of the several Kinds of Injunctions.

An injunction may be obtained by a lord to restrain a copyholder from committing waste.

Richards v. Noble, 3 Meriv. R. 673; *sed* vide Dench v. Bampton, 4 Ves. 700.

A mortgagee is entitled to restrain a mortgagor from cutting down timber if the land without it is a scanty security.

Humphreys v. Harrison, 1 Jac. & W. 581.

Injunctions are granted to restrain the violation by a tenant of particular covenants in leases.

Eden on Inj. 198.

And so also to restrain a tenant from year to year (who is as much bound as a tenant for a longer period to manage his farm in a husbandlike manner) from removing crops, manure, &c., except according to the custom of the country.

Onslow v. ———, 16 Ves. 173; *sed* vide 2 Ves. & Bea. 349.

So also to restrain a tenant from ploughing up pasture, as being a breach of a covenant in the lease to manage pasture in a husbandlike manner.

Drury v. Molines, 6 Ves. 328.

So to restrain him from sowing mustard, saffron, woad, or other deleterious crops, as being contrary to the course of husbandry.

Pratt v. Brett, 2 Madd. R. 62.

A covenant to repair and to surrender buildings in good condition at the end of the term, does not preclude a landlord from obtaining an injunction against pulling down and carrying them away just before the end of the term.

Mayor, &c. of London v. Hedger, 18 Ves. 355.

If a landlord, having taken covenants not to build except according to a certain plan, himself acquiesce in deviations from that plan without coming to the court, he cannot afterwards obtain an injunction to restrain other deviations.

Roper v. Williams, 1 Turner's R. 18.

Deans and chapters, it seems, may be restrained by injunction at suit of the crown from committing waste, but not on the application of a party having no interest.

Wither v. Dean and Ch. of Winchester, 3 Meriv. 421.

The Court of Chancery refused to continue an injunction against commissioners of sewers' removing a float, and thereby reducing the height of water in a navigable river, on the ground that there was a shorter remedy by *certiorari* in the Court of King's Bench, which court interferes with caution in such cases.

Kerrison v. Sparrow, 19 Ves. 449.

It is no objection to obtaining an injunction for a nuisance, that the plaintiff has also commenced an action.

Attorney-General v. Nicholl, 19 Ves. 687; and see 2 Russ. R. 121.

An injunction may be obtained against a purchaser under a decree, not having paid his purchase-money, to restrain waste, though he is not a party to the suit.

Cassamajor v. Strode, 1 Sim. & Stu. 381.

Where a negotiable instrument has been given for an illegal considera-

tion, or where for any other reason the holder is not entitled to negotiate it, the court will grant an injunction to restrain its endorsement or negotiation.

Ex parte Harding, 1 Buck. Ca. B. 24, 37; Eden on Inj. 293; Wynne v. Jackson, 2 Russ. R. 351.

And even though the holders have given good consideration for the bill, still if it is an acceptance by one of several partners for his private debt, and the holders knew that it was accepted without the privity of the partners, such holders will be restrained from endorsing it away.

Hood v. Aston, 1 Russ. R. 412.

An injunction has in like manner been granted to prevent an endorsement on the certificate of registry of a ship.

Thompson v. Smith, 1 Madd. R. 395.

So it was granted to restrain a steward from transferring stock standing in his name, upon strong evidence that it was the produce of his master's property; on the principle, that he who mixes his own property with another's is liable to lose all.

Chedworth v. Edwards, 8 Ves. 46. It is said that in a subsequent case Lord Eldon, upon a consultation with Lord Ellenborough, thought he had gone too far. Cox v. Paxton, 2 Madd. Ch. 155, (2d edit.)

Formerly, in order to restrain a transfer of stock it was necessary to make the body or company parties. But this is now altered by 39 & 40 G. 3, c. 36, which empowers any court of equity to order the Bank, East India Company, and South Sea Company to suffer a transfer, or to pay dividends, or to issue an injunction restraining those companies from making such transfer, &c., although those companies are not parties.

Edridge v. Edridge, 3 Madd. R. 386; and see Stead v. Clay, 4 Russ. 550.

An injunction will be granted to restrain part-owners of a ship from sailing till the *unascertained* share of the plaintiff is ascertained, and the proper security settled. But the plaintiff must apply without laches; and the court will not restrain the sailing on the mere ground that there are goods on board as to which the party applying has a right of stoppage *in transitu*.

Haly v. Goodson, 2 Meriv. 77; Christie v. Cragg, Ibid. 137; Goodhart v. Lowe, 2 Jac. & W. 349.

If executors or administrators, either through misconduct, insolvency, or bankruptcy, are bringing the property of the deceased into danger, an injunction will be granted to restrain them from getting in the assets, and a receiver will be appointed.

Eden on Inj. 300; Middleton v. Dodswell, 13 Ves. 266; Harrison v. Cockerell, 3 Meriv. 1; Scott v. Beecher, 4 Price, 386; Mansfield v. Shaw, 3 Madd. 100.

But the circumstance that an executor is poor and in mean circumstances, is not a sufficient ground for this application.

Eden, 300; 1 Madd. R. 142.

It is now unquestionably settled, that courts of equity have jurisdiction to grant an injunction and receiver for the preservation of property whilst a suit is depending in the Ecclesiastical Court, although an administration *pendente lite* might be there obtained; but the application will only be granted where a suit is actually depending in the Ecclesiastical Court, in the result of which the plaintiff is interested.

Atkinson v. Henshaw, 2 Ves. & Bea. 85; Ball v. Oliver, Ibid. 96; Edmunds v. Bird, 1 Ves. & Bea. 542; Jones v. Jones, 3 Meriv. 174.

An injunction and receiver will not be granted to restrain a partner from

intermeddling with the partnership effects merely on the ground of a dissolution; there must be some *breach* of the duty of a partner or of the contract of partnership.

Harding v. Glover, 18 Ves. 281, Charlton v. Poulterer.

A court of equity interferes with a view to winding up the affairs of the partnership, and not for carrying on the concern.

Charlton. v. Poulterer, 19 Ves. 148.

And the court refused on any other principle to grant an injunction and receiver in the Opera House case.

Waters v. Taylor, 15 Ves. 10; and see 2 Ves. & Bea. 329.

And the court is reluctant to interfere till the parties have tried the means of redress provided by the articles.

Carlan v. Drury, 1 Ves. & B. 154. For a valuable and learned note on the subject of partnership, see 1 Swanst. 512, where the case of Chavany v. Van Somer (see p. 200) is stated from the Register.

The court will not grant an injunction to restrain a breach of one particular covenant in partnership articles (*e. g.* a covenant to use all the names of the firm,) where the breach has not been long continued, and the bill does not pray a dissolution.

Marshall v. Colman, 2 Jac. & W. 266; and see 2 Ves. & B. 329; Harrison v. Armitage, 4 Madd. 143; Goodman v. Whitcomb, 1 Jac. & W. 592; Smith v. Fromont, 2 Swanst. 330; Glassington v. Thwaites, 1 Sim. & Stu. 124.

An injunction may be obtained to restrain the breach of a covenant by an author, not to write for any theatre except a certain one, for such an agreement is not illegal.

Morris v. Colman, 18 Ves. 437.

But where the agreement was to write reports of cases in the Exchequer to be printed and published by plaintiff, the court could not compel the defendant to take notes and write reports, and there was nothing in the agreement by which they could restrain him from writing for any other person.

Clarke v. Price, 2 Wils. Ch. R. 157

Courts of equity will enjoin against the violation of covenants not to carry on trade in particular limits, such covenants being legal.

Harrison v. Gardner, 2 Madd. 198; Williams v. Williams, 2 Swanst. 254; Shackle v. Baker, 14 Ves. 468; Crutwell v. Lye, 17 Ves. 333. And as to restraining breach of agreements, see further Newmarch v. Brandling, 3 Swanst. R. 99; Gascoigne v Chandler, Ibid. 418.

The court will not interfere to restrain the breach of an agreement, of which from its nature there could be no decree for specific performance. Accordingly an injunction was refused to restrain the defendant from communicating the secret of a medical preparation; since if it was a secret the injunction would be useless, as the court would have no means of knowing whether it had been violated or not.

Newberry v. James, 2 Meriv. 446; and see Williams v. Williams, 3 Meriv. 160.

But where the defendant obtained the knowledge of the recipe by a breach of trust and confidence the court granted the injunction.

Yovatt v. Winyard, 1 Jac. & W. 394; and see Canham v. Jones, 2 Ves. & B. 218.

An injunction will be granted to restrain a solicitor who has acted for the defendant from becoming solicitor to the plaintiff.

Cholmondeley v. Clinton, Coop. 80.

But where it appeared the solicitor had no confidential knowledge which might be used to the prejudice of his former client, the injunction was refused.

Robinson v. Mullett, 4 Price, 353; and see Evitt v. Price, 1 Sim. R. 483.

Upon the known jurisdiction of a court of equity to protect the enjoyment of specific valuable chattels (as pictures, furniture, &c.,) the value of which cannot be compensated in damages, an injunction has been granted to restrain the sale of them when taken in execution.

Lady Arundell v. Phipps, 10 Ves. 139.

Persons authorized by act of parliament to cut a canal, if their funds are insufficient for the completion of the undertaking, may, on prompt application by the owner of lands through which they are cutting, be restrained from proceeding.

1 Swanst. 250; Coop. 77.

The dictum of Lord Ellenborough, (*a*) that the lord chancellor would grant an injunction against the exhibition of a picture libellous on individuals, seems erroneous and unsupported by any sufficient authority.

(*a*) Dubost v. Beresford, 2 Camp. R. 511; and see Burnett v. Chetwood, 2 Meriv. 441; and Lord Eldon's observations, Ibid. 440, 441.

(As to the cases of injunctions on copyrights, see p. 198.)

In a late case where the plaintiff, the author of The Antiquities of Magna Græcia, sought to restrain the defendant from publishing a work entitled, "An Essay on the Doric Order of Architecture," as being a piracy both of the text and prints of plaintiff's work, Lord Eldon directed an action to try whether the defendant's work was piratical, or only a fair use of the plaintiff's work in the way of quotation and compilation.

Wilkins v. Aikin, 17 Ves. 422.

There may be copyright in a court calendar; the subject matter is general, as in the case of a chart or map, but the individual labour gives copyright.

Longman v. Winchester, 16 Ves. 269; and see Barfield v. Nicholson, 2 Sim. & Stu. 1.

An injunction was granted to restrain the performance of a comedy sold by the author and assigned to the plaintiffs though it did not appear that the assignment by the author was in writing. (*b*)

Morris v. Kelly, 1 Jac. & W. 481. *Sed* vide Longman v. Oxberry, Eden on Inj. 288. (*b*) This is held necessary. Power v. Walker, 3 Maule & S. 7.

The court will interfere to protect copyright from piracy at the suit of plaintiffs who appear to have a good equitable title, though it should not be quite clear that their legal title is complete.

Mawman v. Tegg, 2 Russ. R. 385.

If the plaintiff has permitted persons to publish and sell the subject of his copyright without having interposed, though this is no justification of the defendant's infringement of his right, yet it will be a sufficient ground to induce a court of equity not to interfere till it has been established at law.

Walcot v. Walker, 7 Ves. 1; Platt v. Button, 19 Ves. 447; Coop. 303. See further, as to copyright injunctions, Tonson v. Walker, 3 Swanst. 672; Nicol v. Stockdale, Ibid. 687.

A plaintiff who complains of piracy of his work has no remedy in equity unless he establish a title to an injunction, and then the account will follow.

Baily v. Taylor, 1 Russ. & Mylne, 73.

(A) Of the several Kinds of Injunctions.

A court of equity will in some cases enjoin against the sale of an estate; as, if the sale is in violation of an agreement to exchange.

Curtis v. Marquis of Buckingham, 3 Ves. & B. 168; and see Echliff v. Baldwin, 16 Ves. 267.

An injunction may be granted on the application of a plaintiff in a bill for an account against a bankrupt, to restrain the assignees from making a dividend till the account has been taken.

Atkinson v. Plumber, Eden on Inj. 298.

An injunction has been granted before answer to restrain presentation or induction to an ecclesiastical benefice.

Potter v. Chapman, 1 Dick. 146; and see 16 Ves. 70.

In order to obtain an injunction against violation of a patent, the party must at the time of applying swear as to his belief that he is the original inventor. Where there has been a length of exclusive enjoyment under a patent, the court will grant an injunction in the first instance, without previously putting the party to establish his right at law, but it is otherwise if the patent is recent.

Hill v. Thomson, 3 Meriv. 622.

It has been laid down in two recent cases, that in an interpleading suit an injunction to stay proceedings cannot be obtained, as in case of waste on bill filed and affidavit, but stands on the same principle as the common injunction.

Croggon v. Symons, 3 Madd. 130; Bailey v. Punard, Ibid. 131, n.; but see *contrà*, Vicary v. Widger, 1 Sim. R. 15; and Eden on Inj. 344.

If an ejectment is brought to try a right to land, a court of equity will restrain the party in possession from setting up a term or other title which may prevent the fair trial of the right. The plaintiff in such case must aver that there are terms actually outstanding; and this averment, if made by the bill, may be met by a negative plea.

Bond v. Hopkins, 1 Scho. and Lef. 43; Pulteney v. Warren, 6 Ves. 89; Crow v. Tyrrell, 3 Madd. 181; Jones v. Jones, 3 Meriv. 172; Armytage v. Wadsworth, 1 Madd. R. 189; Baker v. Mellish, 10 Ves. 544.

Quære, whether an injunction can issue against proceeding under an extent.

3 Swanst. 376.

An injunction was granted to stay proceedings on a sentence in the Admiralty Court, new evidence having been discovered at a time when, according to the practice of the court, it could not be received.

Jarvis v. Chandler, 1 Turner & Russ. R. 319.

A special injunction may be obtained to stay proceedings in an action in the Great Sessions of Wales, where the action was commenced so late, that it is impossible for the plaintiff to obtain the common injunction in time.

Jones v. Basset, 2 Russ. R. 405.

The common injunction to stay proceedings at law, does not extend to a distress for rent.

Hughes v. Ring, 1 Jac. & W. 392.

An injunction granted by the Court of Chancery in Ireland, to restrain proceedings at law there, on an *interlocutory application*, is not of itself sufficient ground to obtain an injunction here against proceedings here for the same matter.

Ball v. Storie, 1 Sim. & Stu. 210.

(B) What shall be a Breach thereof.

Equity will not enjoin a plaintiff at law from proceeding to enforce a verdict obtained by him on the ground that the defendant has subsequently acquired a demand to a greater amount against such plaintiff.

White v. O'Brien, 1 Sim. & Stu. 551.‖

(B) What shall be a Breach thereof, and how punished.

If there be a suit in equity concerning title to a close, and thereupon an order made, that the defendant shall suffer the plaintiff to enjoy the close till, &c., and notwithstanding the defendant upon a title of common put in his cattle, this is no breach of the injunction; for the common was not in question by the bill.

Lane, 96, Bent's case.

A obtained judgment against B but was hung up from taking out execution for a year and a day by injunction out of Chancery, and the question was, whether he could after take out execution without a *scire facias*, and it was holden, that he could not; 1st, Because the common law court cannot take (*a*) notice of Chancery injunctions. 2dly, Because it had been no (*b*) breach of the injunction to have taken out a writ of execution, and to have continued it by *vicecomes non misit breve.*

Salk. 322, Booth and Booth; 6 Mod. 288, S. C. in B. R. (*a*) That a common law court will not enlarge the term in ejectment where the plaintiff has been hung up by an injunction out of Chancery. Salk. 257. (*b*) That a person may enter so as to entitle himself to an action for recovery of the mesne profits, notwithstanding an injunction. Tilley v. Bridge, 2 Vern. 519; Eq. Ca. Abr. 285, S. C. ‖ But it is said by the master of the Rolls in Curtis v. Curtis, 2 Br. Ch. Rep. 631, that what is said in Vernon, as to the injunction not preventing the entry, certainly cannot be right. In Pr Ch. 252, there is the same case, but this point does not appear in that report of it.‖ [So, notwithstanding the injunction, the plaintiff at law is allowed to proceed so far, as that he may be at liberty *eo instante* that the injunction is dissolved, to take out execution: if therefore the defendant be in execution, and plead *plenè administravit*, and the plaintiff at law enter judgment *de bonis testatoris cum acciderint*, he may proceed to a *scire facias* to inquire of assets and enter judgment thereupon. Morrice v. Hankey, 3 P. Wms. 146. See also Sidney v. Etherington, Ibid.]

Where a defendant had taken out execution in breach of an injunction of the Court of Chancery, and some of the bailiffs who served the execution had, as was alleged, found out a place in a wall in the plaintiff's house, that was made up again with bricks, wherein was hid 150*l.* and had taken away the money, and done great spoil to the plaintiff's goods; it was ordered by the lord chancellor, that the defendant should make good this money to the plaintiff, and should satisfy all other damage which the plaintiff would swear he had sustained. And this order was confirmed by the succeeding lord keeper; though it was objected, that the order was unreasonable, in making the plaintiff judge of his own damage; that the defendant came into possession by course of law, and the bailiffs were legal officers, who if they did any thing amiss, the party ought to take his remedy at law against them, and the defendant ought not to be answerable for their misdemeanors. But the lord keeper held the order to be just; and he thought it an idle practice in the court to put a thief to his oath to accuse himself; for he that has stolen will not stick to forswear it, and therefore *in odium spoliatoris* the oath of the party injured should be a good charge upon him that has done wrong.(*c*) ‖And the master was to compute the amount of the loss sustained, together with interest thereon, which was to be paid with costs.‖

Childers v. Saxby, 1 Vern. 207, Eq. Ca. Abr. 15, pl. 2, 299, pl. 11, S. C.; Reg. Lib. 1683, A. fol. 78. (*c*) ‖ Vide E. I. Company v. Evans, 1 Vern. 308: Dorrington

(B) What shall be a Breach thereof.

v Jackson, Ibid. 405; and Dyer v. Tymewell, 2 Vern. 122, where in cases of gross fraud costs were given to be ascertained by the parties' own oath. But in Plampin v. Betts, 1 Vern. 272, a decree by which the defendant was to be concluded by the plaintiff's own oath was reversed.‖

As concerning the breach of injunctions, it hath been of late practised to commit the party on affidavit of the breach and personal notice given to him,(*a*) but never on notice to his clerk; whereas by the ancient rule where a man is guilty of the breach of an injunction, upon an affidavit made thereof, the plaintiff's clerk in court issues out an attachment against him of course, he is arrested thereon, gives bail to the sheriff, and enters his appearance with the register; so the court has hold of him; the plaintiff files interrogatories in the examiner's office to examine him; the interrogatories are *verbatim* according to the affidavit; and if the party neglects to attend and be examined, it is a motion of course to examine him in four days, or stand committed; if he confesses the contempt, he must submit, own his fault, beg pardon, and pay costs; but, if he denies it by his examination, the plaintiff descends to prove it upon him; then the plaintiff moves to refer it to a master, to see whether the party is guilty of the contempt laid to his charge, or not. Here again he hath liberty to be heard, and may except to the report, and bring it on for the judgment of the court; and if the court is of opinion that he is guilty of the contempt, he must stand committed, and pay the costs; but, if the court is of a contrary opinion (which often happens) he is acquitted with costs.

Gilb. F. R. c. 11, § 11. (*a*) ‖ Personal service of notice on the defendant's wife ordered to be deemed personal service on the defendant, and upon that service ordered, that he stand committed for breach of the injunction. Sir William Palmer v. Shelton, 5 Ves. 260. The motion upon breach of an injunction is not in the first instance for an order *nisi*, that the defendant show cause why he should not stand committed; but, if the injunction be restrictive that he shall stand committed, notice of such motion having been personally served upon him; if it direct him to do a thing, that he shall do it by a particular day, or stand committed. Angerstein v. Hunt, 6 Ves. 488.‖ ℘ Rutherford v. Metcalf, 5 Hayw. 60.℘

‖If a party, or his attorney, having knowledge of an injunction's being granted, proceeds at law, he is guilty of a contempt, though the injunction be not sealed.

Powel v. Follet, Dick. 116; 3 Atk. 567; Hearne, printed Osborne, v. Tenant, 14 Ves. 136; Kimpton v. Eve, 2 Ves. and Beam. 349; Scott v. Becher, 4 Price, 346. ℘ A party is bound to respect an injunction though it may have been improperly granted. Moat v. Holbein, 2 Edw. 188.℘

It is now settled, that if an injunction is obtained by a defendant at law, who has given bail, a proceeding against the bail is a breach of the injunction. This began with Lord Thurlowe; before his time the bail were obliged to file a bill themselves. But, if an injunction is obtained by one obligor only in a joint and several bond, execution against the co-obligor on the joint judgment, *with notice to the sheriff of the injunction, and directions not to take the plaintiff in equity*, is no breach of the injunction.

Leonard v. Attwell, 17 Ves. 385; Chaplain v. Cooper, 1 Ves. and Beam. 16.

Attaching and receiving money levied by the sheriff, though levied before the bill was filed, is a breach of the injunction: it would be different if the sheriff had paid it voluntarily. But by Lord Eldon,(*b*) adverting to this case, it is difficult to say how the act of the sheriff can vary the rights of the parties; and I should think that, in such a case, the persons receiving the money would be ordered to pay it into court.

Axe v. Clarke, 2 Dick. 549; Ibid. 705, S. C.; Bolt v. Stanway, Anstr. 556, 569. (*b*) 3 Mer. 234.‖

(C) How dissolved.

Planting potatoes in land previously ploughed is not such breach of an injunction to stay waste, as will be punished by attachment.

Brophy v. Quarry, Hayes' Exch. 449.

Nothing can be deemed a breach of an injunction forbidding the disturbance of a peculiar right of way which does not interfere with its free exercise.

Bosley v. Susquehanna Canal, 3 Bland, 63.

The fact that the defendant in violating the injunction acted under the advice of counsel, will not protect him from a fine sufficient to compensate the adverse party for the injury sustained; although such advice may protect him from further punishment.

Lansing v. Easton, 7 Page, 364.

A party who, together with others, has been restrained by injunction from doing a particular act, is afterwards present, aiding and abetting, when that is done which is so prohibited, is guilty of a breach of the injunction.

St. John's College v. Carter, 4 My. & Craig, 497.

A partner who is enjoined in general terms from intermeddling with the property or effects of the firm is guilty of a breach of the injunction by confessing a judgment to a creditor for the purpose of enabling such a creditor to obtain a preference in payment by levying on the partnership effects.

M'Credie v. Senior, 4 Paige, 378.

Taking money out of a court of law, paid in by rule of court, is a breach of a common injunction against proceeding at law.

Parke v. Earl of Shrewsbury, M'Call. 103; S. C. 13 Price, 289.

Giving a notice of trial is a breach of an injunction to stay trial.

Bird v. Brancker, 2 Sim. & Stu. 186.

Where the plaintiff obtained the common injunction, after four proclamations had been made under an exigent, in an action by defendant against plaintiff, it was held a breach of the injunction for the defendant to sue out a writ to compel the sheriff to make the fifth proclamation.

Marsack v. Bailey, 2 Sim. & Stu. 577.

Assistance rendered to magistrates making restitution after a forcible entry, is a breach of an injunction for quieting possession.

Woodward v. Lincoln, 3 Swanst. 626.

(C) How dissolved.

The methods of dissolving injunctions are various. When the answer comes in, and the party hath cleared his contempt by paying the costs of the attachment, (if there is one,) he obtains an order to dissolve *nisi* (*a*) and serves it on the plaintiff's clerk in court. This order takes notice of the defendant's having fully answered the bill, and thereby denied the whole equity thereof; and being regularly served, the plaintiff must show cause at the day, or the defendant's counsel, where there is no probability of showing cause, may move to make the order absolute, unless cause sitting the court.

Gilb. F. R. c. 11, § 9. (*a*) Special injunctions have been dissolved upon original motion, without having an order *nisi*. Mount v. Turner, Dick. 793. The replying to the answer, serving a subpœna to rejoin, and giving rules to produce witnesses, will not prevent the defendant from moving for an order to dissolve *nisi*, though a considerable

time may have elapsed after the coming in of his answer. Molineux v. Luard, Dick. 684.‖ ℔ Injunctions may be dissolved before answer filed, or afterwards, or after demurrer. Jones v. Commercial Bank of Columbus, 5 How. 43. See Poor v. Carlton, 3 Summ. 70.℈

℔ When an injunction is granted until further answer and order, which is the usual form, it is never dissolved until the answer comes in, although the defendant may live abroad.

Read v. Consequa, 4 Wash. C. C. R. 174. See Thompson v. Allen, 2 Hayw. 151.

And when an answer in which the plaintiff's whole case is denied is not always sufficient to ensure a dissolution of the injunction; the statement of the defendant must be at least credible.

Moore v. Hylton, Dev. Eq. R. 429.

When the injunction is awarded until the answer comes in, it is not dissolved by the coming in of the answer, but must be dissolved by order of the chancellor.

Turner v. Scott, 5 Rand. 332.

The denial of the equity of the bill must be positive in order to dissolve an injunction; a denial from information and belief is not sufficient.

Ward v. Van Bokkelen, 1 Paige, 100.

When the answer is that of a corporation, to entitle the party to a dissolution of the injunction, it must be verified by the oath of some of the corporators who are acquainted with the facts stated therein

Fulton Bank v. New York Sharon Canal Co., 1 Paige, 311.℈

The plaintiff must show cause, either on the merits, or upon filing exceptions.(*a*) If upon the merits, the court may put what terms they please on him; as bringing in the money,(*b*) or paying it to the parties, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to give security to abide the order on hearing, or the like; and to this order is generally added a clause, that the plaintiff shall speed his cause to a hearing.

[(*a*) If no exceptions are filed, the court, upon the master's report, will dissolve the injunction, and sometimes will commit the clerk in court to the Fleet for taking out such injunction, and also make him pay all costs, and sometimes the damages the injured party hath sustained, by reason of such irregular injunction. 2 Harrison's Pr. 264. (*b*) The securing of the fund is a usual condition annexed to injunctions. Cully v. Hickling, 2 Br. Ch. Rep. 182. In an interpleading bill, it seems to be necessary that the money should be actually brought into court before the motion for an injunction; though the practice hath been, to bring it in upon showing cause against the motion to dissolve the injunction. Dungey v. Angove, 3 Br. Ch. Rep. 36.]

℔ Upon the motion to dissolve an injunction, the chancellor confines himself exclusively to the combination of facts set forth in the bill out of which the equity of the injunction arose, and to the answer of the defendant to those facts.

Chesapeake and Ohio Canal Company v. Baltimore and Ohio Rail Road Company, 4 Gill & Johns. 7.℈

If the plaintiff shows cause upon exceptions filed, he must procure the report in four days of the insufficiency of the answer; and if the motion is made at either of the last seals after Hilary or Trinity term, the court sometimes puts the plaintiff upon opening the exceptions, and they judge whether they are material or not. The reason of this is, because the defendant, (if the answer should be reported sufficient,) hath no opportunity

to move the court till the seal before the next term, and is thereby very greatly delayed. If the court think the exceptions material and necessary, they will grant the motion; if otherwise, they will deny it, as the case appears; and there is, or at least should be, always added this clause to the order,(*a*) especially when the motion is made at the last seal; that the plaintiff shall procure the report in four days, or his injunction to stand dissolved without further motion; whereas it is not so in open term, or at any of the seals save the last; and this clause being added, the court needs not to hear the exceptions opened, which oftentimes takes up too much time.

‖ (*a*) Though by the plaintiff's not conforming to the terms of this clause, the injunction will be of course dissolved; yet he may afterwards obtain an order to refer the exceptions to the answer, and upon the answer being reported insufficient, he may move as of course upon notice to revive the injunction. Philips v. Johnson, Dick. 292.‖

If the master reports the answer sufficient, it is a motion of course to dissolve the injunction on the answer's being reported sufficient; but the plaintiff may show cause on the merits; for there are many instances where the plaintiff's counsel may think the answer not full, and yet may be mistaken, and, notwithstanding this, the plaintiff may have good cause on the merits for continuance of his injunction; and it seems reasonable that he have liberty to do it. But this must be done on notice given to the other side; he cannot do it when the defendant's counsel come to move to dissolve the injunction, on the answer's being reported sufficient; because, as this is a motion of course, the party is not prepared to speak to the merits; but he may have liberty on notice given.

β An injunction is not dissolved of course, even upon a full denial of the equity of the bill, if the court can see in the facts disclosed, good reasons for detaining it. Bank of Monroe v. Shermerhorn, 1 Clarke, 303; Shellman v. Scott, Charl. 380.γ

‖ If a defendant's answer is reported insufficient, and the plaintiff obtains an order to amend the bill, and that the defendant shall answer the amendments and exceptions at the same time, he must answer both before he can apply to dissolve the injunction which had been obtained on the original bill. *Secùs*, if he had put in a further answer upon his first answer being reported insufficient, and before the order to amend, &c. Such is the practice in the Court of Chancery; but in the Exchequer, pending exceptions to an answer, a further answer cannot be filed until those exceptions are disposed of. But the tender of such further answer is a submission to the exceptions, and the injunction may be moved for upon it as if correct.

Mayne v. Hochin, Dick. 255; Knox v. Symmonds, 1 Ves. jun. 87; Bethuen v. Bateman, Dick. 296; Edwards v. Johnson, 1 Price, 203.

If, after an injunction is dissolved, the plaintiff amends his bill, and requires a further answer, and the defendant prays a *dedimus* to take his answer; the court, *upon notice and a special application*, will revive the injunction.

Edwards v. Edwards, Dick. 755.‖ β An injunction which has issued unadvisedly, will not be dissolved if it appears from the evidence that the party will be immediately entitled to a new one. Crane v. Phillips, 7 N. S. 276; Exnicios v. Weiss, 3 N. S. 480; Bushnell v. Brown's heirs, 4 N. S. 499; Louisiana Ins. Co. v. Morgan, 8 N. S. 683.γ

[When a plea or demurrer is argued by counsel, and allowed, there is generally, though not always, an end of the injunction. Not always, for it may happen that some equity may be shown for continuing it, arising out of the defendant's answer put in with such plea or demurrer; and upon a

plea or demurrer being allowed, or on the coming in of the answer, the court will not absolutely dissolve the injunction on the first motion, though upon affidavit of notice, but only *nisi*. So, if the master's report is not procured in a reasonable time, after exceptions filed, or if the answer is reported insufficient, the injunction will be dissolved *nisi*, though sometimes absolutely on the first motion.

2 Harrison's Pr. 262; Hurst v. Thomas, Anstr. 585.

An injunction for want of an answer was dissolved, because not served till several months after the answer came in. On cross bills, if when the first is answered, the second is not answered, in eight days, the injunction will be dissolved on motion: but the court will not dissolve an injunction continued on exceptions, if they have not been filed a reasonable time before motion made.

2 Kel. 43.]

‖ It seems to be now settled, though a different practice prevailed in the times of Lord Thurlowe (*a*) and Lord Kenyon, that a reference of the answer for impertinence is good cause against a motion for dissolving the injunction.

Fisher v. Bayley, 12 Ves. 18; Goodinge v. Woodhams, 14 Ves. 534; Hurst v. Thomas, Anstr. 591. But *cont.* Milner v. Golding, 2 Dick. 672. ℘ Joseph v. Simpson, 10 Price, 25; Cox v. Horwell, 2 Yo. & Jer. 36.℘ (*a*) It was said by Lord Kenyon in this case of Milner v. Golding, that the reference for impertinence *is admitting too much, not complaining of too little*; a remark, lively, but not just. To complain that an answer has matter which it ought not to have, is by no means to admit that it has all which it ought to have. It may be at once impertinent and insufficient; and it may be referred for both; but there must be a judgment on the reference for impertinence, before there can be a judgment on the reference for insufficiency, the court not knowing what the answer is, until the question of impertinence has been disposed of.

But exceptions to the master's report as to impertinence are not cause against dissolving the injunction; for though the original exceptions still continue in court, and the court is to decide upon them, yet *quà* the injunction, the report is decisive.

Corson v. Stirling, Coop. 93.‖

If there be two defendants, the court will not ordinarily dissolve the injunction till both have answered.

℘ Jones v. Magill, 1 Bland. 190; Stewart v. Barry, 1 Bland, 192; Williams v. Hall, 1 Bland, 194; Chapline v. Betty, 1 Bland, 197; Tong v. Oliver, 1 Bland, 199.℘ Pr. Reg. 200. ℘ But if the defendant answering state upon oath, positively and fully, that the defendant who does not answer, was not in a situation to know, and in fact does not know, any thing in relation to the matters charged, the injunction will be dissolved upon the answer of a part of the defendants having the whole knowledge of the transactions, if it denies fully the equity of the bill. Vandervoort v. Williams, 1 Clarke, 377; Coleman v. Gage, 1 Clarke, 295; Cape Sable Company's case, 3 Bland, 606. See Goodwin v. The State Bank, 4 Desaus. 289.℘

If the defendant do not sign his answer, regularly, the injunction will be continued; though if the plaintiff take a copy of the answer, this may amount to a waver of the informality.

Anon. Bunb. 251. ℘ Although it is irregular to serve an injunction upon a party, without serving him also with a subpœna to appear and answer the bill, it is too late to give notice of a motion to dissolve the injunction, on that ground, after a subpœna has been served on him. Seebor v. Hess, 5 Paige, 85.℘

℘ An injunction will not be dissolved on an answer which merely states the defendant's ignorance of the principal allegations in the bill, and that he believes them to be untrue.

Apthorp v. Comstock, Hopk. 148. See Williams v Hall, 1 Bland, 194; Roberts v. Anderson, 2 Johns. Ch. 204

(C) How dissolved.

But when an injunction has been obtained against an executor or administrator, it will be sufficient if the answer states facts which must have been within the knowledge of the testator only, upon the belief of the executor or administrator to have the injunction dissolved.

Coale v. Chase, 1 Bland, 137. Whether the answer of one of several executors will be sufficient. See Kilby v. Stanton, 2 Yo. & Jer. 75.

The answer of a corporate body under its common seal, denying the equity of the bill, is sufficient to warrant the denial of an injunction, or to dissolve it if granted.

Haight v. The Proprietors of the Morris Aqueduct, 4 Wash. C. C. R. 601.ℊ

If exceptions, which are put in only to continue an injunction, are overruled, the injunction is dissolved of course without motion.

Walter v. Russel, Bunb. 30.]

‖ Unreasonable delay on the part of the plaintiff is a sufficient reason for dissolving an injunction; as, where a commission to examine witnesses was not returned in two years.

Penney v. Edgar, Anstr. 276. See also what fell from the lord chancellor in Grey v. Duke of Northumberland, 17 Ves. 281.‖ ℘Corey v. Voorhies, 1 Green's Ch. 5; Cammack v. Johnson, 1 Green's Ch. 164; West v. Smith, 1 Green's Ch. 309.ℊ

If the plaintiff who hath an injunction dies pending the suit, in strictness the whole proceedings are abated, and the injunction with them; but even in this case the party shall not take out execution without special leave of the court; he must move the court for the revival of the suit within a time limited, or the injunction to stand dissolved; and as this is never denied, so if the suit is not revived, the party takes out execution. There are some instances where a plaintiff may move to revive his injunction; but as that rarely happens, so it is rarely granted, especially where the injunction hath been before dissolved. But, where a bill is dismissed, the injunction and every thing else is gone, and execution may be taken out the next day.

‖ Askew v. Townsend, Dick. 471; Yeoman v. Kilvington, Ibid. 357; Morgan v. Scudamore, 2 Ves. jun. 361; White v. Hayward, 2 Ves. 461.‖

‖ Although the court of law in which an action has been brought have, upon an application made to what is called its equitable jurisdiction to stay proceedings, refused to do so, yet this is of itself no ground for dissolving an injunction to that effect in a court of equity, upon a disclosure of the very same case and circumstances.

Whitfield v. Rolfe, Coop. 89.‖

‖ It is not material how long the answer has been put in before the motion to dissolve the injunction, as the plaintiff has a day to show cause given him.

2 Ves. & B. 42.

The motion cannot be made *before* answer.

Fowl. Ex. Prac. 282.

It must be made in open court, and the brief must be put into counsel's hands not later than the first day of the seal.

Sharp v. Ashton, 2 Ves. & B. 412.

By the 23d Order, (1828,) the order *nisi* for dissolving the common injunction may be obtained on petition as well as by motion, and every such order must be served two clear days at least before the day upon which cause is to be shown against dissolving.

See 2 Russ. R. Appendix.

(C) How dissolved.

After undertaking to show cause upon the merits, the plaintiff cannot show exceptions for cause.

Harcourt v. Ramsbottom, 2 Swanst. R. 362.

Nor after an enlargement of the time for showing cause.

Pinheiro v. Porter, Ibid. 362.

Where exceptions are shown for cause, and the answer is reported sufficient, the injunction cannot be revived on merits disclosed in the answer.

Peyto v. Hudson, Ibid. 363.

After an injunction granted and order for payment of money into court on a future day, on a threat of going abroad, the court orders instant payment of the money, or dissolves the injunction.

Whitehouse v. Partridge, Ibid. 375.

If there are several defendants, the courts will *in general* not dissolve the injunction till all have answered, but there are exceptions to this rule.

Eden on Inj. 89. *Sed* vide Joseph v. Doubleday, 1 Ves. & B. 497; Ibid. 546; Treat. Chan. Plead. 142, 143; Whitworth v. Davis, 2 Ves. & B. 545.

The contents of documents set forth in the schedule to the answer in an injunction suit may be obtained before the dissolution of the injunction, and used to oppose the motion to dissolve. But if the plaintiff do not use them then, he cannot revive the injunction on an amended bill, introducing the new matter verified by affidavit.

Powell v. Lassalette, Jac. R. 549.

Where an order has been obtained extending the common injunction to stay trial, this order cannot be discharged separately without dissolving the injunction generally.

Earnshaw v. Thornhill, 18 Ves. 485; Bishton v. Birch, 2 Ves. & B. 40; and see Eden on Inj. p. 94.

But where a special order has been obtained *after answer*, restraining the defendant from proceeding to trial till further order of the court, there can be no objection to the injunction being dissolved, so far as it extends to stay trial only.

Raphael v. Birdwood, 1 Swanst. 228.

The order *nisi* must be entered and drawn up, and served on the plaintiff's clerk in court. This is an order *nisi* not to give the plaintiff time generally, but simply that he may have time to look into the answer, and consider whether he will take exceptions or show cause on the merits. If therefore exceptions are taken, and the answer is found sufficient, the defendant may move at once to dissolve the injunction without obtaining the order *nisi* again.

Lacy v. Hornby, 2 Ves. & B. 291; and see Ibid. 44.

All references of answers are now made to the same master by order 10 March, 1818. The plaintiff is usually put upon the terms of obtaining the report in four days or sometimes in a week. If the master reports the answer to be not impertinent, the injunction is gone, and exceptions to his report cannot be shown as cause against dissolving.

1 Swanst. 128; 4 Madd. 237; 14 Ves. 534; Coop. 93; 1 Swanst. 228. *Sed* vide Hansey v. Brown, 4 Madd. 237; Kenny v. Barnwell, 2 Cox. 26.

(D) Miscellaneous Cases.

The court will allow exceptions to be shown for cause, though not filed, on plaintiff's undertaking to file them immediately.

2 Meriv. R. 479.

If the master reports the answer sufficient, the report *ipso facto* dissolves the injunction.

2 Ves. & B. 42; 2 Meriv. 479; 2 Madd. 355.

It is settled that the plaintiff cannot uphold the injunction by taking exceptions to the master's report, nor by appealing from the master of the Rolls' judgment, where he has decided the answer to be sufficient.

1 Ves. & B. 503; 2 Meriv. 479; 2 Cox. 428; 1 Ves. & B. 504.

In showing cause against dissolving, it is now settled that nothing can be read but what appears on the face of the answer.

6 Ves. 793; 7 Ibid. 308; 9 Ibid. 355; 19 Ibid. 148; overruling Isaacs v. Humpage, 1 Ves. jun. 427; but see Morgan v. Goode, 3 Meriv. 10; Taggart v. Hewlett, 1 Meriv. 499; Whitworth v. Davis, 2 Ves. & B. 546.

The answer is only evidence as to facts to which other testimony could be received, and therefore an answer alleging that the true intention of a written agreement was contrary to what appeared on the face of it was not admitted.

Bott v. Birch, 4 Madd. 255.

Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee.

Montague v. Hill, 4 Russ. 128.‖

β (D) Miscellaneous Cases.

Acquiescence by the party complainant in the erection of works, alleged to be in violation of an act of parliament, may, before the legal question has been tried, prevent the court from granting an injunction which would indirectly have the effect of compelling the removal of part of the works already built.

Attorney-General v. Manchester and Leeds R. R. Co., 1 Nich. H. & C. 436.

Injunction refused on the ground of delay in the application, (*a*) or where the complainant has acquiesced in the wrong. (*b*)

(*a*) Lewis v. Chapman, 3 Beav. 133. (*b*) Greenhalgh v. Manchester & Birmingham R. R. Co., 3 My. & Craig, 788; Roper v. Williams, Turn. & Russ. 18.

An injunction directed to several persons not defendants in the suit, and it appearing on the face of the injunction that they are not defendants, is not obligatory on such persons, except as a notice.

Sage v. Quay, 1 Clarke, 347.

The common injunction stays proceedings at law till answer or furthe. order; the injunction in an interpleading suit, stays them till further order.

Moore v. Usher, 7 Sim. 383.

An injunction restrains an existing lien, but does not destroy it. As soon as the injunction is dissolved, the lien is again restored to all its incidents.

Smith v. Everly, 4 How. 178.

When the defendant is restrained by injunction from using money in his possession, interest will not be decreed against him.

Osborn v. The Bank of U. S., 9 Wheat. 738.*g*

INNS AND INNKEEPERS.

(A) Inns by what Authority erected, and how far within the Statutes concerning Alehouses.

(B) Who shall be said a common Innkeeper: And herein of the Privileges allowed him by Law.

(C) Of the Duties enjoined Innkeepers by Law: And herein,

1. *To what Things the Duty of an Innkeeper extends.*
2. *Of the Offence of selling corrupt Commodities, or at exorbitant Prices.*
3. *Of the Offence of refusing to harbour or entertain a Guest.*
4. *In what Cases chargeable for things stolen or lost.*
5. *Who is such a Guest as may charge an Innkeeper.*
6. *Of the Manner in which he is to be charged.*

(D) Of the Innkeeper's Remedies against his Guest.

(A) Inns by what Authority erected, and how far within the Statutes concerning Alehouses.

It seems to be agreed at this day, that any person may set up a new inn, unless it be inconvenient to the public, in respect of its situation, or to its increasing the number of inns, not only to the prejudice of the public, but also to the hinderance and prejudice of other ancient and well-governed inns: for the keeping of an inn is no franchise, but a lawful trade, open to every subject, and therefore there is no need of any (*a*) license from the king for that purpose.

2 Roll. Abr. 84; Palm. 367; Buls. 109; Godb. 345; 2 Roll. Rep. 345; 2 Keb. 506; Salk. 45. (*a*) It is said, that in ancient times inns were allowed in the Eyre. 2 Roll. Rep. 345.—But this is made a *quære* in Palm. 374; and in Hutton, 100, it is said, that there was no such thing in the Eyres; but because that strangers, who were aliens, were abused and evilly entreated in inns, it was, upon complaint thereof, provided that they should be well lodged, and inns were assigned to them by the justices in Eyre.—In Cro. Jac. 528, there is an instance of one outlawed on a *quo warranto* for keeping an inn.

But as inns, from their number and situation, may become nuisances, they may be suppressed, and the parties keeping them may at common law be (*b*) indicted and fined, as being guilty of a public nuisance; and in like manner may they be dealt with, if they usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in their houses.

Cro. Car. 549, Dalt. Justice, c. 7. Vide the authorities, *supra*. (*b*) Four persons were indicted for erecting four several inns *ad communem nocumentum;* and it was ruled, that for several offences of the same nature several persons may be indicted in the same indictment; but then it must be laid *separaliter erexerunt*, and for want of the word *separaliter* the indictment was quashed. 2 Hal. Hist. P. C. 174.

He who has an inn by prescription may lawfully enlarge it upon the same land which has been used with it, either by erecting new buildings thereon, or turning stables into chambers of entertainment; and he shall have the same privilege in such new part, as in any other part of his house.

2 Roll. Abr. 84.

|| If one be presented for keeping an alehouse without license, and the attorney-general confess that it is an inn, yet the court will have it tried.
2 Bulstr. 296.||

Also it is agreed, that the statute of (*a*) 5 & 6 E. 6, c. 25, and other statutes concerning the licensing of alehouses, &c., do not extend to inns, unless an inn degenerate into an alehouse by suffering disorderly tippling, &c., in which case it shall be deemed such.

Hutton, 99; Salk. 45. (*a*) For the construction hereof, vide Mod. 34; Saund. 249; 4 Mod. 144; Carth. 151, 263; Skin. 293; Show. 398; Comb. 405; 2 Ld. Raym. 1303. And note, that as to the licensing of alehouses the justices of the peace are the sole judges, and have a discretionary power of granting or refusing the license, and will not be compelled thereto by *mandamus* or otherwise. Giles's case, 2 Str. 881; Anon. but S. C.; 1 Barnardist. 402; Andr. 180, S. C. cited.

|| If an inn use the trade of an alehouse, as almost all innkeepers do, it shall be within the statutes made about alehouses.
Dalt. c. 56.

It hath been also agreed by law, that innkeepers ought to have license, and be bound by recognisance for keeping good order, as alehouse-keepers are.
Dalt. c. 7, 24; Crom. 77.

No doubt inns must be licensed, as well as alehouses. The statutes upon this subject are numerous, and the recital even of the more important clauses only would exceed the limits of this work. We shall therefore merely refer to them, and follow the reference with a statement of the adjudications respecting them. The statutes are 5 & 6 E. 6, c. 25; 2 Geo. 2, c. 28; 24 Geo. 2, c. 40; 26 Geo. 2, c. 31; 29 Geo. 2, c. 59; 5 Geo. 3, c. 46; 33 Geo. 3, c. 55; 35 Geo. 3, c. 103; 48 Geo. 3, c. 143; 53 Geo. 3, c. 103.

The last acts have made an important alteration in the mode of licensing. For it has been decided, that to authorize a person to keep a public house, and sell ale and spirituous liquors, two licenses are necessary; first, a magistrate's license under the stat. 48 Geo. 3, c. 143; and secondly, an excise license. Neither is operative alone; both together they become so. Without the magistrate's license the public house cannot be opened: without the excise license, even when opened, no exciseable liquors can be legally sold. The penalty for not having the former is under the 35 Geo. 3, c. 119; for not having the latter, under 48 Geo. 3, c. 143, § 5.
R. v. Drake, H. 57 Geo. 3, 1 Chetw. Burn's Justice, 41.

The statute of 26 Geo. 2, c. 31, § 2, requires that the person applying to the magistrates for a license shall produce a certificate under the hands of the minister and major part of the church-wardens and overseers, or else of three or four reputable and substantial householders of the place: but, if the certificate is signed by three or four reputable and substantial householders, &c., it is sufficient, though it has not the signatures of the minister and church-wardens.
Per Cur. R. v. Young, 1 Burr. 556.

Though the 12th section of 26 Geo. 2, c. 31, provides that nothing in that act shall extend to alter the method or power of granting licenses in any city or town corporate; yet that exception does not exempt such places from the operation of the other parts of the act; but magistrates in such districts must grant licenses at a public meeting, and give the like notice of their meeting to grant licenses, as justices for a county give.
R. v. Downs, 3 T. R. 560.

(B) Who shall be said a common Innkeeper.

Though by the 2 Geo. 2, c. 28, § 11, no license shall be granted to any person to keep a common inn or alehouse, or to retail any brandy or strong water, but at a general meeting of the justices of the peace acting in the division where the said person dwells, to be holden for that purpose; yet any justice of the county going to the meeting in the division, is for this purpose a justice of the division.

Per Aston, J., R. v. Price, Cald. 305.

Where two sets of magistrates, for a county and a borough, had a coordinate jurisdiction in that borough, and one of the two sets appointed a meeting for granting alehouse licenses, and when the day arrived, refused a license to a person applying for one; and then the other set of magistrates, subsequently to the prior appointment, but before the first licensing day, appointed a future day for the same purpose, and on that day licensed the person to whom on a former day a license had been refused; it was adjudged to be an indictable offence. For the jurisdiction of holding the meeting directed by 26 Geo. 2, c. 31, attached in those magistrates, who first gave notice of the meeting; and it was a breach of the law in the other magistrates to attempt to wrest this jurisdiction out of their hands.

R. v. Sainsbury, 4 T. R. 451.‖

(B) Who shall be said a common Innkeeper: And therein of the Privileges allowed him by Law.

A PERSON who makes it his (*a*) business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is no way material whether he have any sign before his door or not.

Palm. 374; 2 Roll. Rep. 345. (*a*) If one who is not a common host be assigned *per hospitatorem domini regis* to harbour a man, he is not bound to take charge of the goods of his guest. Roll. Abr. 2; Dyer, 158, in margin.—An infant innkeeper not chargeable. Roll. Abr. 2; *secùs*, of a person *non compos*. Cro. Eliz. 622. β One who entertains strangers occasionally, although he receive a compensation for it, is not an innkeeper. 2 Dev. & Bat. 424.*g*

But, though it be the entertaining of passengers that makes a man an innkeeper, yet it is said, that if a person having put up a sign before his door, afterwards pull it down, he thereby discharges himself of the burden of an innkeeper; but, if after the taking down his sign he uses to harbour men, it is as much a common inn as if he had a sign. (*b*)

Palm. 374; Godb. 346. (*b*) ‖ A sign is not essential to an inn; but is an evidence of it. *Per* Holt, C. J. 12 Mod. 255.‖

It hath been adjudged that a person living at Epsom, and lodging strangers for drinking the waters in the season, and selling them victuals and beer, and to no other persons except such lodgers, is not an innkeeper, so as to have soldiers quartered on him, pursuant to the statute 4 & 5 W. 3, c. 13, for he is not such an *hospitator* against whom an action lies for refusing to entertain a guest. Also, in this case the lodgers have such an interest in their rooms, that they may maintain an action of trespass against any one who should enter into them against their will.

Parkhurst v. Foster, Carth. 417; Ld. Raym. 479, S. C.; Salk. 387, S. C.; 5 Mod. 427, S. C.; 12 Mod. 254, S. C., by the name of Parker v. Flint. [Nor will the privilege of a common inn extend to a livery stable, so as to protect a carriage standing at livery there. Francis v. Wyatt, 3 Burr. 1498; 4 T. R. 567.]

A person who receives cattle to agist, on an agreement to pay so much a

week for them, cannot retain them till payment, as an innkeeper may the horse of his guest, unless there be a special agreement to that purpose.

Chapman v. Allen, Cr. Car. 271.

An innkeeper is distinguished from other traders, in that he cannot [as such] be a bankrupt; for though he buys provisions to be spent in his house, yet he does not properly sell them, but utter them at such rates as he thinks reasonable, and the attendance of his servants, furniture of his house, &c., are to be considered; and the statutes of bankruptcy only mention merchants that use to buy and sell in gross, or by retail, and such as get their living by buying and selling, so that their principal subsistence is by buying and selling; but the contracts with innkeepers are not for any commodities *in specie*, but they are contracts for house-room, trouble, attendance, lodging and necessaries, and therefore cannot come within the design of such words, since there is no trade carried on by buying and bartering commodities.

Crisp v. Prat, Cro. Car. 549; Jones, 437, S. C.; March, 35, S. C.; 3 Lev. 309, Newton v. Trigg; 3 Mod. 327, S. C.; Comb. 181, S. C.; Carth. 149, S. C.; Salk. 109, S. C.; Meggott v. Mills, 12 Mod. 159; 1 Ld. Raym. 286, S. C. See Patman v. Vaughan, 1 T. R. 572; Buscall v. Hogg, 3 Wils. 146.

β A landlord has a right, after he has requested him to depart, to turn a disorderly person out of his house.

Howell v. Jackson, 6 Carr. & P. 723. *g*

For the security and protection of travellers, inns are allowed certain (*a*) privileges, such as that the horse and goods of a guest cannot be distrained, &c.

3 Buls. 270; Co. Lit. 47; 2 Vern. 129. β The innkeeper has a lien on the goods of his guests for board and lodging and wine supplied to such guests' orders; and also for money lent the guest, if it was agreed at the time of the loan, that the guests' goods should be a security for the sums lent. Proctor v. Nicholson, 7 Carr. & P. 67. *g* (*a*) In 1 Roll. Abr. 560, it is said, that, by some opinions, travellers' horses depastured by an innkeeper pay no tithes by the common law.—But the contrary hereof is holden in Hard. 35.

Also, the law takes care of the reputation of an innkeeper; and therefore where in case for words the plaintiff declared, that he was possessed of certain stables *quodam loco vocat. Bell-Savage Inn*, that he had accommodation for travellers, and that he got his living by the exercising of that faculty; that the defendant was possessed of another inn, and that a person, not known, inquiring for the Bell-Savage Inn, (whither he was directed, to set up his horse,) the defendant said these words, *This is Bell-Savage Inn;* and at another time he said to another person, *You have nothing to do there, he has broke and run away, there is no entertainment for man or horse;* by reason of which words he lost his customers; on not guilty being pleaded, the jury having found for the defendant as to the first words, and as to the last for the plaintiff, it was adjudged clearly for the plaintiff. And Hale, C. J., held farther, that if a man keeps an inn, and another that lives just by him, designing to get away his customers, tells a person who inquires for such inn, that no one lives there, this is actionable. Also, it was said by Hale to have been adjudged actionable to dissuade a person from going to an inn, by telling him the small-pox was there.

Hil. 25 & 26 Car. 2, Southwell and Allom; Raym. 231, S. C.

‖ A tavern or coffee-house in London, furnishing beds and provisions, but with no stables, and not frequented by coaches or wagons, is an inn,

and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guests, whether travellers or not.

Thompson v. Lacy, 3 Barn. & A. 283.

(C) Of the Duties enjoined Innkeepers by Law: And herein,

1. *To what Things their Duty extends.*

The duty of innkeepers extends chiefly to the entertaining and harbouring of travellers, finding them victuals and lodgings, and securing the goods and effects of their guests; and therefore, if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king.

9 Co. 87; Dyer, 158; Bro. *Action sur Case*, 76, 92. ‖ Innkeepers are bound by law to receive guests who come to their inns, and are also bound to protect the property of their goods. They have no option to receive or reject guests; and as they cannot refuse to receive them, so neither can they impose unreasonable terms on them. *Per* Lord Kenyon, 6 T. R. 17.‖

For he, who takes upon himself a public employment, must serve the public as far as employment goes; therefore, an innkeeper shall not only answer for his own neglects, but also for the neglects of those who act under him, though he should expressly caution against it.

Salk. 18.

But the duty of an innkeeper does not extend to the finding of his guest with clothes or wearing apparel.

2 Roll. Rep. 79.

Also, if the guest be assaulted and beaten within the inn, he shall have no action against his host; for the charge of the host extends to the movables only, and not the person of the guest.

8 Co. 32, in Calye's case.

If a man comes to a common inn to harbour, and desires that his horse be put to grass, and the host puts him to grass accordingly, and the horse is stolen, the host shall not be charged; because by law the host is not bound to answer for any thing out of his inn, but only for those things that are *infra hospitium*.

8 Co. 32 b, Calye's case, adjudged; 4 Leon. 96, S. P. adjudged; 2 Brownl. 255, S. P. *per Cur.*

But if the owner does not require the host to put his horse to grass, but the host does it of his own head, if the horse be stolen, he shall answer for it.

8 Co. 32 b; 4 Leon. 96; 2 Brownl. 255, S. P. *per Cur.*

Also, if the host upon the command of the guest puts the horse to grass, and by the voluntary and wilful negligence of the host the horse is stolen; as, if the host voluntarily leaves open the gates of the close, by which means the horse strays out, and so is stolen or lost, an action (*a*) on the case lies against the host.

Roll. Abr. 4, Mosley and Fosset. *β* See Jones v. Tyler, 3 Nev. & M. 576; 1 Adol. & Ell. 522; Richmond v. Smith, 8 B. & C. 9.*g* (*a*) This, it seems, must be intended a special action on the case, and not on the custom of the realm; for which vide Rob. Ent. 23, 24; Hern's Plead. 250.

(C) Of the Duties enjoined Innkeepers by Law.

2. *Of the Offence of selling corrupt Commodities, or at exorbitant Prices.*

Innholders are restrained from selling at exorbitant prices, and may be indicted if they extort any greater or larger sums than those rates and prices that are (*a*) imposed on their commodities.

Carth. 150; Skin. 291. An innkeeper indicted for taking too great a price for oats. Cro. Jac. 609. (*a*) In Michaelmas term, 19 Car. 2, proclamation was made in court for the county of Middlesex for the rates and prices of hostlers, viz.: hay for a night and a day for one horse 9*d.* with litter, hay for one day 4*d.* for one horse, without hay 2*d.* Oats 8*d.* by the peck, and not more. Raym. 162.

And to this purpose it is enacted by 21 Jac. 1, c. 21, § 2, "That all hostlers or innholders shall sell their horse-bread, and their hay, oats, beans, peas, provender, and all kind of victual, both for man and beast, for reasonable gain, having respect to the prices for which they shall be sold in the markets adjoining, without taking any thing for litter." And it is further enacted, § 3, that "it may and shall be lawful for every hostler, and innkeeper dwelling in any town or village being a thoroughfare, or a common passage within this realm, and being no city, town corporate, or market town, wherein any common baker exercising the trade of baking, and that being an apprentice at the said occupation by the space of seven years, is dwelling, to make within his house horse-bread sufficient, lawful, and of due assize according as the price of grain and corn now is, and hereafter shall be from time to time." And it is further enacted, § 4, "That if the horse-bread which any of the said hostlers or innholders shall make be not sufficient, lawful, and of due assize according to the price of grain and corn as is aforesaid; or that if any of them shall offend in any thing contrary to this act, then the justices of assize, justices of oyer and terminer, justices of peace in every shire, liberty, or franchise within this realm, sheriffs in their turns, and stewards in their leets and lawdays, shall have full power and authority to inquire, hear, and determine the said defaults and offences of the said hostlers and innholders hereafter to be committed against the form of this present statute. And the said hostlers and innholders for the first offence shall be fined according to the quantity of the offence, and if, being once convicted, he shall again offend, for the second offence he shall be imprisoned for the space of one month without bail or mainprize, and if he shall a third time offend, being thereof convicted, he shall stand upon the pillory, without being redeemed for money; and if he shall offend after the judgment of the pillory given, he shall be forejudged for keeping any inn again."

And vide 23 E. 3, c. 6, and Hawk. P. C. 235.

[By 2 Geo. 3, c. 14, "No brewer, innkeeper, victualler, or other retailer of strong beer or ale shall at any time hereafter be sued, impleaded, or molested by indictment, information, popular action, or otherwise, for advancing, or having advanced the price of strong beer or ale in a reasonable degree." But it is also enacted, § 2, "That if any common or other brewer, innkeeper, victualler, or retailer of beer or ale, shall mix, or cause or suffer to be mixed in any vessel, tub, measure, or otherwise howsoever, any strong beer, ale, or strong worts with any small beer, or small worts, or with water, after the guage of such strong beer, ale, or strong worts shall have been taken by an officer of excise, every such person so offending, for every such offence, shall respectively forfeit and lose the sum of fifty pounds."]

If an innkeeper sell corrupt wine or victuals, an action lies against him: also, if his servant sell such corrupt wine or victuals, an action on the case

lies against the master, though he did not order the servant to sell it to any particular person.

9 H. 6, 53; Roll. Abr. 95.

3. *Of the Offence of refusing to harbour or entertain a Guest.*

It has been already observed, that if one who keeps a common inn (*a*) refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his (*b*) tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but may also be indicted and fined at the suit of the king.

Dyer, 158, pl. 33; 2 Brownl. 254; 2 Roll. Rep. 345; Keilw. 50; Palm. 367; Godb. 346; Salk. 388; Carth. 150, S. P. admitted. (*a*) Without a reasonable excuse; and therefore if he refuse under pretence that his house is already full of guests, if this be false, an action on the case lies. Dyer, 158; Roll. Abr. 3. (*b*) That he is not bound to let him have meat unless paid before-hand; for the host is not bound to trust. Bro. *Action sur Case*, 76; Bro. *Contract*, 43; 9 Co. 87 b. β An innkeeper is not bound to entertain the agent of a rival inn, who seeks to decoy away his customers. Jencks v. Coleman, 2 Sumn. 221.*g*

Also, it is said, that an innkeeper may be compelled by the constable of the town to receive and entertain a person as his guest.

5 E. 4, 2 b; Dalt. c. 7; Show. 268.

Also, an innkeeper, or a person keeping a livery stable, (*c*) is obliged to receive a horse, though the owner does not lodge in his house: for by taking upon him a public employment, he is obliged to serve the public as far as his employment extends.

Moor, 867, pl. 1229. In 2 Brownl. 254, it is said by Coke, C. J., that an innkeeper is not bound to receive a horse, unless the master be lodged there.—And herewith in York v. Grindstone, 1 Salk. 388, and 2 Ld. Raym. 866, S. C., by the name of York v. Grenaugh, my Lord C. J. Holt agrees; but the other three judges differ from him, because by the keeping of the horse the innkeeper has gain, though it would be otherwise, of a trunk, or other dead thing. [(*c*) But *qu.* as to a livery-stable keeper? Francis v. Wyatt, 3 Burr. 1498; 1 Bl. Rep. 483.]

‖ An innkeeper licensed to let post-horses, is not therefore liable to an action for refusing to furnish them to a traveller, though he have a chaise and horses at liberty at the time, and though a reasonable price be tendered to him for the hire.

Dicas v. Hides, York Spring Ass. 1816, *coram* Le Blanc, J., 1 Stark. N. P. 247; 1 Holt. Rep. 207.‖

β An innkeeper offered a proper bedroom to the plaintiff for passing the night, or a room below with fire and candle to sit up all night, but he insisted on another room which was vacant; held, that the innkeeper was justified in refusing it.

Fell v. Knight, 8 Mees. & W. 269.

An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and it is not requisite that the guest should tender the price of his entertainment, if the objection is not taken on that ground; it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist on these particulars. But if the guest come to the inn drunk, or behave in an indecent or improper manner, the innkeeper is not bound to receive him.

R. v. Ivens, 7 C. & Payne, 213.*g*

(C) Of the Duties enjoined Innkeepers by Law.

4. *In what Cases chargeable for Things stolen or lost.*

Innkeepers are clearly chargeable for the goods of guests stolen or lost out of their inns, and this without any contract or agreement for that purpose; for the law makes them liable in respect of the reward, as also in respect of their being places appointed and allowed of by law, for the benefit and security of traders and travellers.

Dyer, 266; 8 Co. 32 a: Poph. 178; Noy, 79; Latch. 179. β Towson v. The Havre de Grace Bank, 6 Har. & John. 47. But though in general an innkeeper is liable for whatever is deposited in his house, yet if the trust of the depositor be reposed in another person living in the house, the case is taken out of the general rule. Sneider v. Geiss, 1 Yeates, 34.β

And this duty and burden enjoined innkeepers by law, they cannot discharge themselves of, under pretence of (*a*) sickness, want of understanding, (*b*) absence from their houses, &c.

Fitz. *Hostler;* 5 Bro. *Action sur le Case,* 41. (*a*) Therefore if an innkeeper be so distempered that he is not of a sound memory, and a guest knowing thereof inns there, where his goods are stolen, an action on the case lies against the innkeeper, for he cannot disable himself by saying he was not then of a sound memory. Cro. Eliz. 622, Cross and Andrews, adjudged. Roll. Abr. 2, S. C.—But an infant innkeeper shall not be charged, for his privilege shall be preferred and take place of the custom. Roll. Abr. 2. Vide head of *Infancy and Age.* (*a*) If the innkeeper goes abroad, he must answer for the goods of his guest; for he ought to have a servant to take care of them in his absence. 11 H. 4, 45; Roll. Abr. 4.——But, if an inn is broken open, and the goods of guests are taken away by the king's enemies, the innkeeper is not answerable. Plowd. 9 b.

But, if a person comes to an innkeeper, and desires to be entertained by him, which the innkeeper refuses, because his house is already full, whereupon the party says, he will shift among the rest of the guests, and there he is robbed, the host shall not be charged.

Bendl. 60, pl. 101; Dyer, 158; And. 29, adjudged. [But where an innkeeper refused to take charge of goods till a future day, because his house was full of parcels, and the owner afterwards stayed in the inn as a guest, and the goods were stolen during his stay, it was holden, that the innkeeper was bound to make good the loss. Bennett v. Mellor, 5 T. R. 273.]

It is said in Dyer, that if the host require his guest to put his goods in such a chamber under lock and key, and that then he will warrant their safety, else not, and notwithstanding the guest suffer them to lie in an outer court, where they are stolen, no action lies against the host; for they were not lost through the neglect of the host, but of the guest.

Dyer, 266, Spencer's case.—But in Moor, 78, 158, the S. P. seems to be holden otherwise, and that the host cannot discharge himself of this branch of his duty by such a declaration as this.

If the host delivers the key of the chamber where the goods are to the guest, and he leaves the door open, and the goods are stolen, yet an action lies against the host; for at his peril he ought to keep safely the goods of his guests.

8 Co. 33 a, in Calye's case.

|| But if the guest deposit his goods in a room in the inn, which he uses as a warehouse, and of which he has the exclusive possession, the host is not liable for the loss of them.

Farneworth v. Packwood, Stark. N. P. C. 249.

So, where the guest had a private room in the inn, chosen by himself, for the purpose of exhibiting his goods for sale, and the host at the same time that he granted the use of it to him, told him that there was a key,

and that he might lock the door, which he neglected to do; it was holden, that the host was not liable for the loss of these goods.

Burgess v. Clements, 4 M. & S. 306; Stark. N. P. 251, n.‖

If the guest is robbed by his servant, or by one who comes with him, or by one who desires to be lodged with him, he shall have no action against the host; for it was folly of the guest to keep such servant or company, and there is no default of good custody in the host.

8 Co. 33 a, in Calye's case, Cro. Eliz. 285; Fitz. *Hustler*, 1, 2, S. P.

It seems the host is answerable, though the guest does not acquaint him what goods, &c., he has.

8 Co. 33 a; 5 T. R. 275, 6. But it is said, that if an host demands of his guest what money or goods he has, and he tells him none, or less in truth than he has, if afterwards they are lost, the host is not answerable. Moor, 158, *per* Anderson. But Windham and Perryam *contr.*

β On a fair-day a traveller arrived at an inn with a horse and gig, and ordered the horse to be put in the stable, but gave no special directions as to the gig. The horse was put in the stable, and the gig was put with other carriages in the public highway, near the house, where it was the practice of the landlord to put carriages on fair-days. The gig was stolen. The landlord was held answerable for the loss.

Jones v. Tyler, 3 Nev. & M. 576; 1 Ad. & Ell. 522.*g*

‖ Where a traveller went to an inn and desired to have his luggage taken into the commercial room, from whence it was stolen, the innkeeper was held responsible, although he proved that, according to the usual practice of his house, the luggage would have been deposited in the guest's bed-room, and not in the commercial room, if no order had been given respecting it.

Richmond v. Smith, 8 Barn. & C. 9. As to the liability of carriers, see the alterations of the law made by the late act 11 G. 4, and 1 Will. 4, c. 68.‖

5. *Who is such a Guest as may charge an Innkeeper.*

If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is after robbed, yet shall not the host be charged; for this guest was no (*a*) traveller.

2 Brownl. 214; 8 Co. 32 b; Roll. Abr. 3, S. P.; Skin. 276, S. P. (*a*) By the ancient law the first day he was called a traveller, the second day a hogenhind, and the third day a menial servant, whom the host should answer in the leet for, as his servant. *Per* Dodderidge, Latch. 81. See Fortesc. Rep.

If a man comes to an inn with a hamper, in which he hath several goods, and goes away, leaving this with the host, and (*b*) two days after comes again, but in the time of his absence it is stolen, he shall have no action against the host; for at the time of the stealing he was not his guest, and by the keeping of the hamper the host had no benefit, and therefore shall not be charged with the loss of it in his absence.

Roll. Abr. 3, 338; Cro. Jac. 188; Noy. 126, S. C. adjudged between Jelly and Clerk. (*b*) Otherwise, if he had returned the same night. Moor, 877; Poph. 179.

But, if A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though perhaps, being at the end of his journey, he cannot then be said *transeuns*, according to the writ in the register.

Latch. 127; Poph. 179; Dyer, 158 b, in margin.

But, if an attorney hires a chamber in an inn for the whole term, he is *quasi* a lessee, and if robbed, the host is not answerable.

Moor, 877.

So, if a man upon a special agreement boards or sojourns in an inn, and is robbed, the host shall not answer for it.

Latch. 127; Hetley, 49.

So, if the guest(*a*) deliver the goods to the host upon another account, he shall not be charged if lost or stolen.

Roll. Abr. 3. (*a*) But how far a man shall be charged with the safe custody of goods by a general acceptance. Vide Co. Lit. 89; Roll. Abr. 338, and tit. *Bailment.*

If a man comes to an inn with a horse which he rides, and leaves it with the host, and goes away from the inn for several days, and in his absence the horse is stolen, yet shall the host be charged for it, because he had benefit by the continuance of the horse with him, inasmuch as he is to be paid for it, and so the owner is a sufficient guest to maintain an action.

Roll. Abr. 3; Moor, 877; Noy. 126; Salk. 388; [2 Ld. Raym. 867. *Secùs*, of goods left in an inn, because the innkeeper has no advantage by them.]

If a man's(*b*) servant, travelling on his master's business, comes to an inn with his master's horse, which is there stolen, the master may have an action against the host, because the(*c*) absolute property is in him.

Cro. Ja. 224; Yelv. 162; Dyer, 158, in margin. Noy. 79; Roll. Abr. 3. (*b*) But, if a person takes another's horse and rides him to an inn, where he is stolen, the owner shall not have an action against the host, but must pursue his remedy against the taker. Roll. Abr. 3. (*c*) It is said, that if a common carrier is robbed in his inn, the owner, and not the carrier, shall have the action. Dals. 8. But this, it seems, is not law, being founded on a supposition that the carrier is not answerable to the owner.

So, if A sends money by his friend, and he is robbed in his inn, A shall have the action.

Yelv. 162.

If one joint-tenant of goods is robbed, both may have the action.

Latch. 127; Poph. 179.

|| Soldiers billeted are guests.

Clayt. 97. In Com. Dig. tit. *Action on the Case for Negligence*, (B,) it is said, they must be quartered fourteen days.||

6. *Of the Manner in which he is to be charged.*

The(*d*) form of the writ is thus, *cum secundum legem et*(*e*) *consuetudinem regni nostri* Angliæ *hospitatores, qui hospitia communia tenent ad hospitand. homines, &c., transeuntes, et in eisdem hospitantes, eorum bona, &c., absque substractione seu amissione custodire tenentur,* (*g*) *quidam malefactores quendam equum*(*h*) *ipsius A, &c.,* (*i*) *infra* (*k*) *hospitium ejusdem B, &c., invent. pro defectu ipsius B ceperunt, &c.*

8 Co. 32 b. (*d*) For this vide Reg. 104 a, 105 a, F. N. B. 94 b. (*e*) This is the course, for it is not a custom confined to a particular place, but it is such as is extensive to all the king's people. 3 Mod. 227; Fitz. *Hostler;* 2 Bro. *Action sur Case*, 41. (*g*) He need not name them, because by presumption of law he hath no knowledge of them. Plow. 129 a. (*h*) *Per* Hetley, 49, it ought to be shown that the guest *transeuns hospitavit;* yet *quære;* for perhaps he was at the end of his journey; Latch. 137; Poph. 179, and all the entries are otherwise. (*i*) The writ was, 100*l.* of the plaintiff *in hospitio* of the defendant *hospitati ceperunt*, &c., and though objected *in hospitio* referred to the person, and not to the money, and that he might harbour in the house of the defendant, and his money be stolen elsewhere, and that it should have been *ibidem invent. ceperunt*, yet the writ was adjudged good. Fitz. *Hostler*, 2; Bro. *Action sur le Case*, 58. (*k*) And this is well enough, though not shown by what authority or license held. 2 Roll. Rep. 346; Palm. 374; Godb. 346.

The *writ* need not mention that the defendant (*l*) keeps *commune hospitium*, for it must be so intended; for the recital of the writ is, *hospitatores*

(D) Of the Innkeeper's Remedies against his Guests.

qui communia hospitia tenent, &c., and the latter words depend upon the former; (*m*) but the plaintiff ought to *count* that he kept *commune hospitium.*

8 Co. 32 a. (*l*) In the writ he may be named yeoman, but in the declaration it must be shown that he is a common hostler. Bro. *General Brief*, 16; Bro. *Action sur Case*, 58; Fitz. *Hostler*, 2. (*m*) Vide Dyer, 266, pl. 9; Hob. 245; 2 Leon. 162.

If in such action brought (*a*) by the master for goods stolen from his servant, the plaintiff lays the custom that innkeepers ought safely to keep the goods of their guests, and all other goods brought into their inns, the custom is sufficiently alleged to maintain the action, notwithstanding it was objected (*b*) that there was no such custom to keep the goods of others safely.

Cro. Ja. 224, Beedle Morris, adjudged; Yelv. 162, S. C. (*a*) In this case there is no direct writ in the register; but by the statute of Westminster 2, the clerks shall agree to make a special writ. Dals. 8, 9. (*b*) That the misrecital thereof is immaterial, for it is the common law. Latch. 127, *per* Jones and Dod; 1 Sid. 245; Hob. 18; 3 Mod. 227.

If in his declaration the plaintiff lays the custom for common inns, and then lays that he was *hospitatus in hospitio, &c.*, this is well enough, for it must be intended that it was *commune*, else it is *domus, et non hospitium.*

Hob. 247, and vide Rast. Ent. 405; Rob. Ent. 22.

|| An indictment against an innkeeper for not receiving a sick person must state that he was a traveller.

R. v. Luellin, 12 Mod. 445.||

The declaration against an innkeeper was thus—*præd. D com. hospitat. adtunc et ibidem existen. in stabulum deliberavit* a certain gelding, to be by him safely kept, at a reasonable rate, and to be by him safely re-delivered to the plaintiff; and after verdict for the plaintiff, it was objected, that for aught appears the horse was put into the defendant's stable without his privity, in which case he is not bound to take any care of it; for the words being *præd. D com. hospitat. existen.*, may as well be taken in the ablative as dative case: but the court held, that the words being indifferent to an ablative or dative case, they ought to be taken in that case which makes the declaration good, and therefore gave judgment for the plaintiff.

6 Mod. 223, Stanyon and Davis; Salk. 404, S. C. but not S. P. β To support an action against an innkeeper for goods lost, it is sufficient to prove that the defendant kept a common ordinary; that the plaintiff was his guest, that the goods were brought to the inn, were in the care of the defendant and were lost. Quintor v. Courtney, 1 Hayw. 40.*g*

(D) Of the Innkeeper's Remedies against his Guests.

INNKEEPERS may detain the (*c*) person of the guest who eats, or the horse which eats, till payment, and this they may do without any agreement for that purpose; for men, that get their livelihood by entertainment of others, cannot annex such disobliging conditions that they shall retain the party's property in case of non-payment, nor make so disadvantageous and impudent a supposition, that they shall not be paid; and therefore the law annexes such a condition without the express agreement of the parties.

39 H. 6, 18; 5 H. 7, 15; 2 Roll. Abr. 85; Cro. Car. 271; Carth. 150; Salk. 388. (*c*) May detain the person of his guest. Show. 269. For it would be hard to oblige him to sue for every little debt, and a greater hardship that he might not be able to find him who was his guest.—But, if a person goes into an inn or tavern, and calls for wine, and goes away without paying for it, no action of trespass lies against him; for the going into the inn or tavern was lawful, and therefore the vintner must pursue his remedy by action of debt, 8 Co. 147, or on the case.

(D) Of the Innkeeper's Remedies against his Guests.

If A injuriously take away the horse of B, and put him into an inn to be kept, and B come and demand him, he shall not have him until he hath satisfied the innkeeper for his meat; for when an innkeeper takes a horse into his keeping he is not bound to inquire who is the owner of the horse which he is obliged to keep, let him belong to whom it will, and therefore no reason that the innkeeper should be obliged to deliver him till he is satisfied.

Yelv. 67; 3 Buls. 269, 270; 2 Roll. Abr. 85; Poph. 128, 179; 2 Ld. Raym. 867.

If A deliver a horse to an innkeeper, and B promise, that in consideration that the innkeeper will deliver over the horse to A, that he, viz. B, will satisfy him for his meat; this is a good promise, for here is a good consideration, inasmuch as the innkeeper loses the detainer, which is a damage, and A regains his horse that is to his advantage.

Hutton, 101.

An innkeeper that detains a horse for his meat cannot use him, because he detains him as in the custody of the law, and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer.

Moore, 877; 2 Roll. Rep. 438.

But by the custom of London and Exeter, if a man commit a horse to an hostler, and he eat out the price of his head, the hostler may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffic with strangers, that could not be known, to charge them with the action. (*a*) But the innkeeper hath no power to sell the horse, by the general custom of the whole kingdom.

Moore, 876; 3 Buls. 271; Yelv. 67; Roll. Rep. 449. (*a*) Vent. 71, S. P.; 1 Str. 557.

But, if A commit the horse of B to an hostler in London, and he eat out his head, yet cannot the hostler sell him: for all customs being derogatory to the common law, are to be taken strictly; and there is no custom of London that hath gone so far as this case, to authorize one man to sell and convey the property of another.

2 Roll. Abr. 85.

If a man commit his horse to an innkeeper, and he put him to pasture, he may detain the horse until he be satisfied for the meat; for the pasture of such persons, set up by the law for entertainment, hath the same privilege with the stables.

2 Roll. Abr. 85.

If a horse be committed to an innkeeper, it may be detained for the meat of the horse, but not for the meat of the guest; for the chattels are only in the custody of the law for the debt that arises from the thing itself, and not from any other debt due from the same party; for the law is open for all such debts, and doth not admit private persons to take reprisals.

2 Roll. Rep. 438, and vide 2 Roll. Abr. 85.

If a horse be committed to an innkeeper, and be detained by him for his meat, and the owner take him away, the innkeeper must make fresh pursuit after him, and retake him, otherwise the custody of him is lost; for he cannot retake him at any other time: for if a distress be rescued, and the party upon fresh pursuit do not retake it, the distress is lost; for no man that has only a naked custody can make a reprisal, when the

thing is out of his custody; for it is in the power of an owner and proprietor, and of him only, to retake such his property, wherever he finds it.

2 Roll. Rep. 438. [If a horse be once parted with by the innkeeper, he cannot, upon his coming in again, detain him for what was due before. Jones v. Pearle, 1 Str. 557; 8 Mod. 172, S. C., by the name of Jones v. Thurlowe.]

But, if a horse be committed to an hostler, and he detain him for his meat, and after the owner come to an agreement that the hostler shall retain him till he is satisfied, here he hath not only the custody of him as a distress, but also the property in him as a pledge; and if the owner take it from him, he shall not only retake it upon fresh pursuit, but wherever he meets it; because he had a property by such contract, and a man that hath a property may retake his own where he meets with it.

2 Roll. Rep. 438.

Upon evidence the case was, a man had a horse in an inn, and came thither and directed that the innkeeper should not give him any more food, for he would not be responsible for it; and the question was, whether for the food after this direction given by the innkeeper to the horse, he who brought the horse thither shall be charged, or not. And Holt, C. J., at first inclined that this is a discharge, and that the horse (though he might be retained by the innkeeper) yet is but in the nature of a distress, and it being in the custody of the innkeeper in his inn, this is a pound covert, and the horse afterwards ought to be found and maintained at the peril of the innkeeper. But after, *mutatâ opinione*, he directed, that this was not a discharge; for then any innkeeper might be deceived, and it is the lessening of the security of an innkeeper, who may detain, and, by the custom of London, sell the horse for his keeping.

Skin. 648, Gilber v. Berkley.

β In an action by an innkeeper for meat, drink, &c., it is not requisite that the writ or declaration should state that the debt accrued to him in that character.

Banks v. Oden, 1 Marsh. Kty. R. 546

In Pennsylvania, the act of assembly which provides that tavern-keepers shall not recover more than twenty shillings for liquor or other tavern reckoning applies as well to travellers as to others, and to lodging and food as well as for liquors. (*a*) But if the bill be for what is consumed at one time, the innkeeper is not considered as giving credit, (*b*) and the act does not apply to boarders.(*c*)

(*a*) Duchman v. Hagerty, 6 Watts, 65; but see Ogden v. Miller's executors, 1 P. A. Bro. 47. (*b*) 6 Watts, 67. (*c*) Scattergood v. Waterman, 2 Miles, 323.*g*

JOINT-TENANTS AND TENANTS IN COMMON.

(A) Of the Nature of their Estates: And herein of the Difference between Joint-tenants, and Tenants in common.

(B) What Persons may be Joint-tenants or Tenants in common.

(C) Of what Things there may be a Joint-tenancy or Tenancy in common.

(D) How a Joint-tenancy is created.

(E) How a Tenancy in common is created.

(F) What Words create a Joint-tenancy, and not a Tenancy in common, *et e converso.*

(G) Of the Duration and Continuance of the Estate, whether given jointly, or in common: And herein, where the Inheritance shall be said to be joint or several.

(H) Of the joint and distinct Interest of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

1. *In what Acts they must all join.*
2. *Where the Acts of one will be equally advantageous as if done by both.*
3. *Where the Acts of one will bind the other, whether to his Advantage or Prejudice.*

(I) Of Severance and Survivorship: And herein,

1. *Of the Right of Survivorship, and what Things will survive.*
2. *At what Time the Right of Survivorship is to take place.*
3. *What Disposition will work a Severance, and defeat the Right of Survivorship: And herein,*
    1. What Disposition with a Stranger will work a Severance.
    2. What Disposition or Conveyance by one Joint-tenant or Tenant in common, with his Companion, will work a Severance.
    3. At what Time such Disposition must be made to take effect.
4. *What shall be a total Severance, or but for a limited Time.*
5. *How far the Charges or Encumbrances of one Joint-tenant shall affect the Survivor.*
6. *Of Severance by Operation of Law.*
7. *Of Severance by Compulsion of Law; and therein of the Writ* de partitione faciendâ.

(K) Joint-tenants and Tenants in common how to sue, and be sued: And herein of Summons and Severance.

(L) Of the Remedies which Joint-tenants and Tenants in common have against each other.

(A) Of the Nature of their Estates: And herein of the Difference between Joint-tenants and Tenants in common.

WHERE (*a*) a feoffment is made to two or more, and their heirs, or a lease is made to them for term of their (*b*) lives, they are joint-tenants; for being jointly enfeoffed, &c., they shall jointly hold *per mie et per tout*, and shall jointly implead and be impleaded, which property is common between

them and coparceners; but joint-tenants have a sole quality of survivorship which neither coparceners nor tenants in common have.

Lit. § 277. β In this country, the title by joint-tenancy is very much reduced in extent. In Ohio, Tennessee, Mississippi, Alabama, Connecticut, and Illinois, joint-tenancies have been generally abolished; in Indiana they are changed into tenancies in common; in South Carolina, the death of one joint-tenant operates as a severance; in Vermont, Massachusetts, Maine, New Hampshire, and Rhode Island, there must be express words of a manifest intention to create a joint-tenancy; in New Jersey and Maryland, there must be an express declaration that the property shall be held in joint-tenancy. See 1 Hill. Ab. 440.*g* (*a*) Or may be created by other conveyances, such as fine, recovery, bargain and sale, release, confirmation, &c. Co. Lit. 180 b. (*b*) Or by other limitations, as if a rent-charge of 10*l.* be granted to A and B, to have and to hold to them two, viz. to A until he be married, and unto B till he be advanced to a benefice; they are joint-tenants in the mean time, notwithstanding the several limitations, and if A die before marriage, the rent shall survive; but, if A had married, the rent should have ceased for a moiety; *et sic e converso* on the other side. Co. Lit. 180 b.

Tenants in common are those that come to the land by several titles, or by one title and several rights; as, if there be three joint-tenants, and one alien his part, the other two are joint-tenants of their parts that remain, and hold them in common with the alienee. So, if joint-tenants make several feoffments or gifts in tail, or leases for life, the feoffees, donees, or lessees are tenants in common.

Lit. § 292; Co. Lit. 189 a.

And as the essential difference between joint-tenants and tenants in common is, that joint-tenants have the lands by one joint-title, and in one right, and tenants in common by several titles, or by one title and by several rights; this is the reason, says my Lord Coke, that joint-tenants have one joint freehold, and tenants in common have several freeholds, though this property is common to them both, viz.: that their occupation is undivided, and neither of them knoweth his part in several.

Co. Litt. 189 a.

Hence, it appears, that the wife of a joint-tenant cannot be endowed; as, if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed, but it shall go to the survivor, who then is in from the first feoffor or donor, and may plead it as an original feoffment or gift to himself, and so is paramount her title of dower, which is not complete till her husband's death; and one book says, it was the ancient course in mortgages to make the estate to two, in order to prevent the mortgagee's wife of dower.

3 Co. 27; Co. Lit. 30 a, 31 b, 37 b. Bro. tit. *Dower*, 4, 84; Cro. Eliz. 503; Perk. § 334.

But the wife of a tenant in common shall be endowed; for there, no survivorship takes place, but each moiety (*a*) descends to the respective heirs of the respective tenant in common, and in such case the dower shall be assigned in (*b*) common too; for she cannot have it otherwise than her husband had.

Lit. § 44, 45; Co. Lit. 34 b, 37 b. (*a*) And it hath been adjudged that a writ of dower will lie against the heir of the tenant in common before partition made. 3 Lev. 84, Sutton v. Rolf; *supra*, vol. iii. p. 214, S. C. (*b*) And not by metes and bounds; for which vide Brownl. 127; Roll. Abr. 682; Perk. § 413.

Also, if there be two *joint-tenants*, and one *release* to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee, which they jointly took, and are possessed of by force of the first conveyance. But *tenants in common* cannot *release* to each other; for a release supposeth the

party to have the thing in demand; but *tenants in common* have several distinct freeholds, which they cannot transfer otherwise than as persons who are sole seised.

Co. Lit. 9, 200 b.

If lands be given to A and B and the heirs of A, B, who is only joint-tenant for life, cannot surrender his estate to A, for he is seised *per mie et per tout* with A, and A with him.

22 H. 6, 51; 2 Roll. Abr. 86; 40 E. 3, 41 b.

If land be given jointly to two, upon condition that they shall not alien, and one of them release to the other, it is no breach of the condition.

Winch. 3; Raym. 413.

If there be two joint-tenants of land holden by heriot service, and one die, the other shall not pay heriot service, for there is no change of the tenant, the survivor continuing tenant of the whole land.

Owen, 152, Butler v. Archer.

And although tenants in common have several freeholds, yet one tenant in common cannot disseise the other, otherwise than by an actual disseisin, as turning him out, and hindering him to enter; but a bare perception of the profits is not enough.

Salk. 392, Reading's case. || But it is not necessary, as was said by Lord Mansfield, in Doe v. Prosser, Cowp. 217, to show actual force in order to prove an ouster, as by turning a man out by the shoulders; it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. Undisturbed and exclusive perception of profits for a length of time is sufficient evidence of an ouster to go to a jury. Peaceable v. Reed, 1 East, 574.||

(B) What Persons may be Joint-tenants or Tenants in common.

An alien and subject may be joint-tenants, *et nullum tempus occurrit regi;* therefore, if an alien and subject born purchase lands to them and their heirs, the survivorship shall take place till office found; but the office found entitles the king, and severs the joint-tenancy.

Co. Lit. 180 b. || See Mr. Hargrave's note (2) on this passage.||

If a villein and another person purchase lands to them and their heirs, the lord of the villein may enter into a moiety.

Co. Lit. 186 a.

Bodies politic or corporate cannot be joint-tenants with each other, neither can a corporation, whether sole or aggregate, be joint-tenant with a natural person; and therefore, if land be given to two bishops, or abbots, or parsons, and their successors, they are tenants in common at first, and have no joint estate for life; for they take in their politic capacities in right of their churches or houses. So, if land be given to the king and a subject, and their heirs; or if the crown descend to a joint-tenant; or if lands be given to a layman and a parson, and to the heirs of one, and successors of the other; they are tenants in common, for the fee vests in them in several capacities.

Co. Lit. 189 b, 190 a; Moore, 202; 2 Saund. 319.

But, if a lease for years or other personal thing be given to a layman and bishop, &c., they are not tenants in common, but joint-tenants; for as no chattel personal (*a*) can go in succession, they must both take in their natural capacities.

Co. Lit. 190 a. || Ibid. 46 b. (*a*) See exceptions to this rule, Ibid. 90 a. Fulwood's case, 4 Co. 65 a; Arundel's case, Hob. 64; F. N. B. 120; B. Hargr. Co. Lit. 9 a, n. 1; Ibid. 90 a; and Ibid. 190.||

(B) What Persons may be Joint-tenants.

Disseisors may be joint-tenants, and upon the death of one of them the survivor shall have the whole: for the right, such as it was, continued jointly in them.

21 E. 3, 50 b; 2 Roll. Abr. 87

Infants may be joint-tenants, and if there be two infants joint-tenants, who alien in fee, and one of them die, the survivor shall have the whole; for notwithstanding the alienation, the joint-tenancy is not severed, by reason of the possibility of defeating it by writ *dum fuit infra ætatem.*

21 E. 3, 50 b; 2 Roll. Abr. 87.

Baron and feme may be joint-tenants. But herein it is to be observed, that husband and wife being considered but as one person in law, if an estate be made to husband and wife, and a third person, and their heirs, the husband and wife take but one (*a*) moiety, the third person the other.

Lit. § 291. (*a*) A purchased a copyhold estate, and took surrender thereof in the names of himself, his wife and daughter, and their heirs, which he afterwards, as visible owner thereof, mortgaged to J S. On a bill brought by the mortgagee against the mother and daughter, to discover their title, and to set aside their estates, as fraudulent against the mortgagee, who was a purchaser; it was holden by the court not to be fraudulent, and that the husband and wife took one moiety by entierties, which the husband could not alien, nor dispose of so as to bind the wife, and that the other moiety was well vested in the daughter. Back v. Andrew, 2 Vern. 120 a; Pr. Ch. 1, S. C. See also Anon. Skinn. 182; Bricker v. Whatley, 1 Vern. 233. ‖ See also Doe v. Wilson, 4 Barn. & A. 303; Preston on Abstracts, vol. ii. p. 39; Attorney-General v. Bacchus, 9 Price, 30.‖

Also, baron and feme being one person in law, there can be no moieties between them of an estate given to them jointly during coverture; and therefore if lands be given to husband and wife, and their heirs, the husband cannot during the wife's life dispose of any part of them, but the whole must go to the survivor.

Co. Lit. 187 a; Green v. King, 2 Bl. Rep. 1211; Doe v. Parratt, 5 T. R. 652. {8 Ves. J. 199.}

But, if an estate be made to a man and a woman and their heirs, before marriage, and after they marry, the husband and wife have moieties between them.

Co. Lit. 187 b. See cases referred to in Mr. Hargrave's n. 2, on this passage.

And as there can be no moieties between husband and wife of an estate given to them during marriage, it hath been holden, that if the husband be attainted and executed, the wife shall by her petition regain all such lands conveyed jointly to her and her husband.

Co. Lit. 187.

If an estate be made to a villein, and his wife being free, and to their heirs, albeit they have several capacities, viz. the villein to purchase for the benefit of the lord, and the wife for her own; yet, if the lord of the villein enter, the wife surviving shall enjoy the whole; because there are no moieties between them.

Co. Lit. 187.

It is said, that if a deed of feoffment or grant of a reversion be made to them whilst sole, and then they intermarry before livery or attornment, that they take no moieties; but, if they had been seised of a use by moieties before 27 H. 8, c. 10, and such use had been executed, by the statute, they should have had the estate of the land by moieties; for they should have the estate in such plight as they had the use.

Co. Lit. 187.

If husband and wife vouch, and recover by force of a warranty made to them when sole, yet they shall have no moieties in the estate recovered.

Co. Lit. 187.

If A make a feoffment to the use of himself and such wife as he shall marry, and afterwards take a wife, he and his wife are joint-tenants, though he were seised of a qualified fee before the marriage, and the wife had nothing; for by the marriage the contingent estate vested in them both at the same time by the said limitation.

Co. Lit. 188; Co. 101; Dyer, 340.

If A purchase a *walk in a chase*, and take the patent thus, viz., to himself and his wife, and one J S, for their lives, and the life of the longest liver of them, and afterwards A die indebted, this purchase is not assets; for it shall be presumed to be intended as an (*a*) advancement and provision for the wife; for she cannot be a trustee for her husband, and therefore she shall enjoy the benefit of it during her life; but after her decease in case J S should survive her, then to be a trust for the executor of the husband, and applied towards the payment of his debts.

2 Vern. 67, decreed between Kingdon and Bridges. ‖ See Back v. Andrew, *supr.* 242. See also Christ's Hospital v. Budgin, 2 Vern. 683, *infr.* 244, but in that case there were assets. In Watts v. Thomas, 2 P. Wms. 364, where the husband purchased a term for himself and his wife and the survivor, and afterwards mortgaged it himself without his wife, and then died indebted, the equity of redemption was holden to be assets.‖ (*a*) If a father purchase lands in the name of himself and son on a valuable consideration, and the father afterwards devises those lands, the Court of Chancery will not suppose the concurrence of the son was only in trust for the father, but that he was made joint-tenant for his own advantage; and this, it is said, was the ancient way of purchasing to avoid wardships. Chan. Ca. 28; Scroope v. Scroope, Gilb. Uses, 136. See Stileman v. Ashdown, 2 Atk. 477; and Pole v. Pole, 1 Ves. 76, and *infr.*, tit. *Uses and Trusts*, (D). But see also Sugden's Treatise of Purchases, 517.

A lease is made to A, and to husband and wife, viz., to A for life, husband in tail, wife for years; in this case each of the three has a several estate.

Co. Lit. 187 b.

If an estate be limited to husband and wife and the heirs of the body of the husband, they are joint-tenants for life, and the inheritance is so executed in him, that if he makes a feoffment, this will be a discontinuance to his issue; but, if he suffers a common recovery with single voucher, this will bind neither the issue, nor any remainders; because his wife was seised of the whole jointly with him, and not of part, and there are no moieties between them, and therefore it cannot be good for any part; but the feoffment deals with the possession, and gives it away by solemn livery; and therefore to preserve the warranty, this amounts to a discontinuance, and the issue shall be put to his *formedon in descender*, and those in remainder to their *formedon in remainder;* and if the husband levies a fine, this will bind the issue, by the statutes 4 H. 7, c. 24, and 32 H. 8, c. 36.

2 Co. 61; Cro. Eliz. 470, 481; Poph. 52; Dyer, 9, pl. 22; Cro. Car. 320; 3 Co. 5; Moore, 210; Yelv. 131; Lev. 37; Sid. 83.

And as the husband, being jointly seised with his wife of the lands cannot alien them; so neither can he charge such lands; and therefore, where the husband in such case acknowledged a recognisance, and died, it was holden, that the wife should hold the lands discharged.

Roll. Abr. 346.

(B) What Persons may be Joint-tenants.

Husband and wife may be joint-tenants of a lease for years, of other chattel (*a*) real, as well as of a freehold or estate of inheritance.

43 E. 3, 10; Roll. Abr. 349. (*a*) But, if goods are given to a husband and wife, the wife shall not have them by survivorship, but the executor of the husband. 43 E. 3, 10; Roll. Abr. 349.

So, if (*b*) a statute be acknowledged to baron and feme, they are joint-tenants of this, and the feme shall have all by survivorship.

48 E. 3, 12 b; Bro. *Baron and Feme*, 24; Roll. Abr. 342, 889, S. C. (*b*) So, if an obligation be made to baron and feme. Roll. Abr. 342.

Also, it hath been ruled in Chancery, that where the husband lends out money in the names of himself and his wife, upon mortgages and bonds, and dies, that the wife is entitled to the money by survivorship, if there are assets sufficient to pay the husband's debts.

Christ's Hospital v. Budgin, 2 Vern. 683. ‖ See Wilde v. Wilde, 31 July, 1823. Roper's Bar. and Feme, by Jacob, vol. i. p. 54, (in which page the point in the case of Watts v. Thomas, 2 P. Will. 364, is wrongly stated; but see it correctly stated *antè*, p. 243.) George v. Bank of England, 7 Price, 646; Rider v. Kidder, 10 Ves. 360; Pitt v. Pitt, 1 Turner C. R. 180.‖

But, where the husband is jointly possessed of a leasehold interest, or other personal thing, he may dispose of it in his lifetime without the consent or concurrence of his wife.

Roll. Abr. 343.

But, if a lease be made to baron and feme for years, the baron cannot devise the term; for the feme is in by survivorship before the devise takes effect.

Co. Lit. 351; Roll. Abr. 344. But 2 H. 4, 19 b, *semb. contr.*

Also, if a lease be made to baron and feme for their lives, remainder to the survivor, or to the executors of the survivor of them, and the baron grant the term, and die, this will not bar the wife surviving; because the wife had but a possibility, and no interest.

10 Co. 51; Godb. 139; 4 Leon. 185; Hutton, 17; 2 Roll. Abr. 48, pl. 3; Poph. 5; Cro. Eliz. 841; Co. Lit. 46 b; Roll. Abr. 344.

If the baron be indebted to the king, and purchase land for years, to him and his wife, and die, this land shall be put in execution for the debt, because the baron hath power to dispose of the term.

Fleetwood's case, 8 Co. 171. But in 1 Roll. Abr. 346, this is made a *quære.*

If a (*c*) rent-charge be granted to a man and a woman for years who afterwards intermarry, and after arrearages incur, and after the baron die, the feme shall have the residue of the rent, and also the arrearages in a writ of annuity, because they participate of the nature of the principal.

Roll. Abr. 350. (*c*) So, if baron and feme are seised of a rent-service for their lives, the rent incurs, and after the baron dies, the feme shall have the arrearages incurred during the coverture. Moore, 887; Hob. 208; Cro. Eliz. 791.

If there be a baron and feme joint-tenants for life, and the baron sow the land, and die before severance, his executor shall have the emblements, and not the feme; and it is said, there is no diversity between this and where the baron is seised in right of the feme.

Roll. Abr. 727; Co. Lit. 55 b; and note (7); Noy, 142, S. C.; and the court divided thereupon. Dyer, 316, S. C., cited in margin to have been adjudged accordingly; Cro. Eliz. 61, cited to have been adjudged; and vide Owen, 102, and 2 Vern. 322, where J S, on his marriage, settled lands to the use of himself and his wife for their lives and of the survivor of them, remainder to the heirs of their two bodies; and the husband dying and leaving the ground sown with corn, the question was, whether the emble-

ments on the land settled as aforesaid should go to the wife, or to the executors of the husband; and the Court of Chancery proposed to each to take a moiety, which was agreed to.

(C) Of what Things there may a Joint-tenancy or Tenancy in common.

THERE may be a joint-tenancy not only of lands and tenements, but also of chattels personal, as well as real, such as leases for years, a horse, &c., for where two come to these by a joint gift or purchase they shall survive, and not go to the executors of the party.

Co. Lit. 181 b; 2 Roll. Abr. 87.

But an exception is to be made of two joint-merchants; for the wares, merchandises, debts, or duties, which they have as joint-merchants or parceners shall not survive, but shall go to the executors of the deceased; and this *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of trade and commerce; for being *pro bono publico*, the rule is, that *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*

Co. Lit. 182 a; 2 Brownl. 99; Noy, 55.

But, though there is no survivorship between merchants, yet, if there are two joint-merchants, or two who are jointly possessed of goods in the way of trade, who casually lose them, and afterwards one of them dies, the survivor alone may, it seems, bring trover for them; for the action must necessarily survive, though the interest doth not, otherwise there would be a failure of justice; because the survivor and the executor of him who is dead cannot join in the action, for that their rights are of several natures, and there must be several judgments. But it being holden clearly, that if this was any plea, it must have been in abatement, for this reason the books say the principal point was not determined.

Carth. 170, 171; Kemp v. Andrews, Carth. 170; Show. 188, S. C.; 3 Lev. 290, S. C. ‖ Martin v. Crump, Comb. 474; Salk. 444, S. C. That the remedy, though not the duty, survives is now unquestionable.‖

Also, there may be tenants in common of chattels real or personal, entire or several, as leases for years, wards, horses, &c., as when any of those who were joint-tenants of them grant over their interest to a stranger, the grantee and the other are tenants in common.

Lit. § 320; Co. Lit. 199 a.

Also, if there be two tenants in common of a seignory, and a ward fall, they are tenants in common of the wardship as well of the body as land; and so it is, if the land escheat to them, they shall be tenants in common thereof.

Co. Lit. 199 a.

If a corody be granted to two men and their heirs, in this case, because the corody is uncertain, and cannot be severed, it shall amount to a several grant, to each of them one corody; for the persons are several, and the corody is personal.

Co. Lit. 190 a.

If two take a lease jointly of a farm, the lease shall survive; but the stock on the farm, though occupied jointly, shall not survive; neither shall a stock used in a joint undertaking in the way of trade survive; and therefore, it is said not to be necessary in articles of copartnership to provide against it.

Jeffereys v. Small, Vern. 217. See 9 Ves. 596. ‖ In Elliott v. Brown, in case 25th

(D) How a Joint-tenancy is created.

July, 1791, where Elliott and Brown had had a joint demise of a farm, the profits of which they had divided equally; Lord Thurlowe held, that, upon the death of Elliott, his moiety went to his executor. Vide Jackson v. Jackson, 9 Ves. 596; Lister v. Dolland, 1 Ves. jun. 434; Lake v. Gibson, 3 P. Wms. 156. It seems now settled that all real property belonging to and used for the purposes of a partnership, is to be considered as personal property, and that the *jus accrescendi* does not apply to it; and see also Thornton v. Dixon, 3 Bro. C. C. 199; Crawshay v. Maule, 1 Swanst. 508, 521; Burroughs v. Elton, 11 Ves. 29; Stuart v. Marquis of Bute, 11 Ves. 665; Ripley v. Waterworth, 7 Ves. 425; Bell v. Phyn, 7 Ves. 453; Balmain v. Shore, 9 Ves. 50; Townsend v. Devaynes, Mont. on Part. Notes, p. 97; Selkrig v. Davies, 2 Dow. P. C. 242, *per* Lord Eldon.‖

‖ If two persons have a party-wall, half of the thickness of which stands on the land of the one, and the other half on the land of the other, they are not therefore tenants in common of the wall, or of the land on which it stands; although the wall was erected at their joint expense; the wall in that case following the property of the soil on which it is built.

Matts v. Hawkins, 5 Taunt. 20.‖

(D) How a Joint-tenancy is created.

A JOINT-TENANCY may be created by (*a*) fine, recovery, bargain and sale, release, confirmation, &c.

Co. Lit. 180 b. (*a*) But it is said, that a fine *sur conuzance de droit come ceo, &c.*, cannot be levied to two, and their heirs; for the end of fines being to settle the possession not only for the present, but for ever, the admittance of such fine would not answer that end. For besides the uncertainty which of the conusees should survive and enjoy the land, the fine itself cannot operate according to the limitation; for the survivor, by the privilege of joint-tenancy, shall enjoy the whole, and for ever exclude the heirs of the other conusee. Besides, the fine, being equivalent to a judgment, ought to decide and settle the right of the fee. 2 Roll. Abr. 19; Co. Reading on Fines, 5, 9.

Also, a joint-tenancy may be created by (*b*) a disseisin; as, if two or more disseise another of lands, &c., to their own use, they are joint-tenants; but, if to the use of one of them, he to whose use the disseisin is made is sole tenant, and the others coadjutors.

Lit. § 278; Co. Lit. 180 b. (*b*) And as there may be joint-tenants by disseisin, so there may be joint-tenants by abatement, intrusion, or usurpation. Co. Lit. 181 a, and vide Vaugh. 189.

If a disseisin be made to the use of two, and one agree at one time, and another at another time, yet they are joint-tenants; for every subsequent assent is equal to a command precedent; and if both had commanded the disseisin, the first act had been the act of both, and therefore, from that act done, they are now esteemed as joint-disseisors.(*c*)

Gilb. Uses, 135; Co. Lit. 188 a; Co. 56; 2 Leon. 223; 13 Co. 56. (*c*) ‖ This, Mr. Sugden apprehends, is totally independent on the statute of uses. The actual disseisor is merely the agent, or coadjutor of the others, and their assent has relation to the disseisin. Gilb. Uses, 136 n. (I).‖

Yet it is laid down as a general rule, that joint-estates must vest at once, and that, therefore, if a lease for life be made to A, remainder to the heirs of J S and J N then living, [and J S have issue, and die, and afterwards J N have issue and die, and then the tenant for life die,] the heirs are tenants in common. For when J S dies, his heir hath either a sole property of the fee, or he hath it with others: [he cannot have it with others,] because there is none in being to take it with him; and if he had a sole property of the fee, it cannot alter without some act of his own: but he cannot have a sole property in the whole remainder, for that were

expressly contrary to the conveyance; he must, therefore, have a sole property of the fee in a moiety; which is a tenancy in common.(*a*)

Co. Lit. 188 a; Gilb. Uses, 133. (*a*) || This case is at common law, and although the remainder was limited by one fine and by joint words; yet because that by the death of J S the remainder, as to one moiety, vested in his heir, and by the death of J N as to the other moiety, vested in his heir, *at several times*, they cannot be joint-tenants. 10 Co. 57; Sugden's note (9); Gilb. Uses, 134.||

But in case of a use, persons may be joint-tenants that do not take at the same time; as, if a man enfeoffs such a one to the use of himself for life, and of such a wife as he shall afterwards take, they are joint-tenants; for here, the husband has no property in the land, neither *jus in re* nor *ad rem*, but the feoffee has the whole property, at first to the [use of the] husband only, and upon the contingency of the marriage, to [the use of] them both entirely; and this is the only rule in equity to support the trust in the same manner the parties have limited it; and now by the statute of uses it is executed in the same form it was governed in equity.

Gilb. Uses, 134; Co. Lit. 188 a; 13 Co. 56; Dyer, 340; 1 Co. 101. [The unity of time or necessity that the estate of each joint-tenant should be vested at the same period, which is insisted upon by Sir Wm. Blackstone, 2 Comm. 180, is, if not contradicted, rendered doubtful by several authorities. Aylor v. Chep, Cro. Ja. 259; Earl of Sussex v. Temple, 1 Ld. Raym. 311, 312; Stratton v. Best, 2 Br. Ch. Rep. 240; Oates v. Jackson, 2 Str. 1172. See also Mr. Sugden's note (10), in Gilb. Uses, 135.]

|| Where two purchase to them and their heirs, with *equal* payments, this is a joint-tenancy in equity, and there is a survivorship.

Aveling v. Knipe, 19 Ves. 440; and see Pre. Ch. 332.||

If a man enfeoffs or levies a fine to A in fee, to the use of himself and B and their heirs, they are at common law joint-tenants of the use; for the estate in a use vests according to the intent of the parties, which was to place the entire use in them, and the possession only in A; and since the statute executes the possession in the same manner as the use was, they are not tenants in common, as one in by the common law, and the other by the statute, but joint-tenants by the words of the statute.(*b*)

Gilb. Uses, 132; Roll. Abr. 791; 13 Co. 55; Hutton, 112. (*b*) || That is, as Mr. Sugden clearly states it, before the statute of uses, they took the use or trust as joint-tenants: after the statute they were held to take the use in the same way, because otherwise there would be a fraction of the estate, one would be in at the common law, and the other by the statute. It was no uncommon thing, before the statute, for a man to name himself as a feoffee with others, to his own use; and the act has a particular provision, § 2, for this very case. It was principally upon that provision that in the cases in the text the *cestuis que use* were held to take as joint-tenants. Sugd. Gilb. Uses, 133, note (8).||

If a man enfeoffs A to the use of A and B they are joint-tenants, though B gave no consideration, because the use is disposed of expressly to him.

Gilb. Uses, 136; 2 Roll. Abr. 791.

If a charter of feoffment be made between A of the one part, and B and C of the other part, and A give lands to B *habendum* to B and C and their heirs, C takes nothing by the *habendum*, because all the lands were given to B, and, consequently, C cannot hold those lands which are given before to another. But in this case, if the *habendum* had been to B and C and their heirs, to the use of B and C, this had been a good limitation of the use, and, consequently, the statute would carry the possession to the use, and B and C thereby become joint-tenants.

13 Co. 54; Poph. 126.

If lands are given to a woman and the heirs of the body of her husband

who is then dead, it is said that the wife and the issue of the husband are joint-tenants for life, with remainder to the issue in tail; for since they are named to take in possession with the wife, if they should only take an estate for life, the donor would have the land again, though there were still heirs of the body of the husband; and whoever answers that description is comprised within the words of the gift; therefore, they shall also have a remainder in tail.

2 Roll. Abr. 416; 6 Co. 17.

If a man has issue only two daughters, and devises his lands to them and their heirs; this, though it be a devise to the heir at law, (for so are the daughters,) make them joint-tenants, in which survivorship shall take place; for, by the will, the quality of the estate is altered.(*a*)

Anon. Cro. Eliz. 431; Packman v. Cole, 2 Sid. 53; Hedger v. Rowe, 3 Lev. 127.

(*a*) || Where a testatrix devised and bequeathed all her leasehold, freehold, and copyhold estates to trustees, their heirs, executors, administrators, and assigns, upon trust to sell, and pay debts, &c., and after payment thereof to pay and apply the rents and profits of the estates, or of so much as should not be sold to A for life; and after his decease gave, devised, and bequeathed all such parts of the said estates as should not be sold and disposed of for the purposes aforesaid, unto the heir or heirs at law of B, and the heirs, executors, or administrators of such heir or heirs at law, directing her trustees to convey to them accordingly; and it happened that the heirs of B were also the heirs at law of the testatrix; it was adjudged, that by this devise the descent was broken, and the devisees took as joint-tenants by purchase; and therefore the equitable estate survived, just as the legal estate would have survived. Swaine v. Burton, 15 Ves. 365.||

If lands be demised to two, to have and to hold to one for life, and the other for years, they are not joint-tenants; for an estate of freehold cannot stand in jointure with a term for years; nor can a reversion upon a freehold stand in jointure with a freehold and inheritance in possession.

Co. Lit. 188 a.

β Testator bequeathed the surplus of his estate as follows: "the overplus shall fall to my sons A, B, and C, two-thirds, and one-third to my three daughters, D, E, and F." B, one of the residuary legatees was also an executor. Held, that the residuary legatees took as joint-tenants, and, one of them dying in the lifetime of the testator, his share vested in the others.

Robinson v. Martin, 2 Yeates, 525.

When a deed conveyed land to A and B, their heirs and assigns, habendum, "to the said A and B, their heirs and assigns, and to the heirs and assigns of the survivor of them for ever;" held, to pass a joint-tenancy.

Davidson v. Heydon, 2 Yeates, 459.

A father and two sons obtained separate patents for 400 acres of land each, adjoining one another, and the father obtained a patent for another tract of 400 acres; afterwards the three took one inclusive patent for the whole tracts, and another tract of 1162 acres. This destroyed the separate estates in the first three tracts, and created a joint-tenancy in the whole 2762 acres, comprised in the inclusive patent.

Jones v. Jones, 1 Call. 458.*g*

(E) How a Tenancy in common is created.

TENANTS in common, as hath been said, are those that come to the land by several (*b*) titles, or by one title and several rights, and they have the possession in common, though several rights, and it may be by purchase, descent, or prescription.

Co. Lit. 189 a. (*b*) As, if the one and his ancestors, or they whose estate he hath in

one moiety, have holden in common the same moiety with the other tenant, which hath the other moiety, and with his ancestors, or with those whose estate he hath, undivided, time out of mind. Lit. § 310; Co. Lit. 195.

If there be three joint-tenants, and one alien his part, the other two are joint-tenants of their parts that remain, and hold them in common with the alienee.

Co. Lit. 189.

So, if there be two coparceners, and one of them alien her part, the alienee and the other coparcener are tenants in common.

Lit. § 309.

Also, if joint-tenants make several feoffments or gifts in tail, or leases for life, the feoffees, donees, or lessees are tenants in common.

Co. Lit. 189 b.

If land be given to two, *habend.* the one moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common.

Co. Lit. 190 b.

So, if one seised in fee, enfeoff another of a moiety, or third or fourth part, without any assignment of it in severalty, the feoffee and feoffor are tenants in common.

Co. Lit. 190 b; {3 Mass. T. Rep. 362.}

If there be two joint-lessees for life, and one grant all that belongs to him to another, the grantee and the other lessee are tenants in common as long as both lessees are alive, and the lessor shall enter into a moiety by the death of either of them; because by such grant the jointure was severed; and it makes no difference in this case, if the joint-lease was made by these words, *habend.* to them two for their lives, and to the survivor; for *expressio eorum quæ tacitè insunt nihil operatur.*

Co. Lit. 191.

If there be three joint-tenants, and one of them release to one of the other two all his right; as to this third part, he to whom the release was made and the other joint-tenant are tenants in common; but as to the other two-thirds, they continue joint-tenants as before.

Lit. § 304; Co. Lit. 193 a. Vide *supr.* (A).

‖ Where a corporation were owners of fee of land, which certain burgesses were entitled to have divided between them every year according to a certain stint settled by a leet jury; such burgesses having the exclusive enjoyment of the land for a year for the purpose of turning out their cattle upon it, were considered as tenants in common of it.

R. v. Watson, 5 East, 480.‖

β A grant by an act of the legislature to two or more persons in fee is to be considered as conveying to the grantees an estate in common, unless a different tenure is expressed in the grant.

Higbee v. Rice, 5 Mass. 344.

When several patentees bear in equal proportions the expenses of obtaining a patent, and by the recital of deeds among themselves, it appears that they intended to purchase in common, they will be considered as tenants in common, though the patent be to them jointly.

Cuyler v. Brandt, 2 Caines' Cas. 326.

An estate given to husband and wife is not a joint-tenancy; each party

takes an entirety, and the survivor takes the whole, not by survivorship but by virtue of the original conveyance.

Thornton v. Thornton, 3 Rand. 179; Rogers v. Grider, 1 Dana, 242.

To distinguish a joint-tenancy from a tenancy in common the following seems to be the rule: when an estate is given to several persons jointly, without any expression intimating that it should be divided among them, it will be construed to be a joint-tenancy; but when it appears either from express words, or from the nature of the case, that it was the testator's intention that the estate should be divided, it then becomes a tenancy in common.

Martin v. Smith, 5 Binn. 16.

The words "equally to be divided," or "equally," without more, make a tenancy in common.

Evans v. Brittain, 3 S. & R. 138; Larsh v. Larsh, Add. 310. See Allison v. Kurtz, 2 Watts, 185; Drayton v. Drayton, 1 Desaus. 329; Administrator of Bunch v. Administrator of Hurst, 3 Desaus. 288; 2 Lit. R. 113; 2 J. J. Marsh. 372; 3 Monroe, 380; 4 Bibb, 420.

Where a deed of bargain and sale in the *premises* granted the land to several persons, "to them or any of them, their or any of their heirs or assigns," and the *habendum* was "to them, their heirs and assigns for ever;" held, that the grantees took as tenants in common.

Galbraith v. Galbraith, 3 S. & R. 392. See Bambaugh v. Bambaugh, 11 S. & R. 191.

Where a purchase of land is made by two persons as joint-tenants, with a view of expending large sums of money in its improvement, equity will consider the tenants as tenants in common.

Duncan v. Forrer, 6 Binn. 196.

The residue of real and personal estate was devised by a testator to his two sons, as joint-tenants; the two sons for twenty years carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock; with such moneys they purchased other estates in the name of one of them, but never entered into an agreement respecting such farming business, or ever accounted with each other; held, that they continued at the death of one of them, joint-tenants of the property which had passed by the will of their father, but were tenants in common of the after-purchased estates.

Morris v. Barrett, 3 Yo. & Jer. 384.*g*

‖ Devise to the devisor's wife for life, and after her decease unto and among all and every their children, in such manner and proportions as she should in her life, or by her will, appoint, empowering her to sell and receive the interest for life; and appointing, after her decease, both principal and interest to and among the children, in such proportions as aforesaid. All the children died in the lifetime of their mother, who never made an appointment. Held, that they were entitled, as tenants in common, to several estates of inheritance.

Casterton v. Sutherland, 9 Ves. 446; and see Reade v. Reade, 5 Ves. 744.

Devise to A and B, "between them," constitutes a tenancy in common.

Lashbrook v. Cock, 2 Meriv. 70.

Where a testator devised all his estate equally to his sisters M and E, or to the survivor of them, and to be disposed of by the survivor as she might by will devise; it was held, that the sisters did not take as tenants in common in fee; nor, supposing them to be tenants in common for life, with a contingent remainder in fee to the survivor, or with a power to the survivor

to dispose of the fee by will, was it such a contingent remainder as was devisable by will, made by one sister in the life of the other, since the contingency is uncertain even as to the *person to take* during the life of both sisters.

Doe v. Tomkinson, 2 Maule & S. 165.

Where a testator by his will devised his residue to his daughters as tenants in common, and afterwards made a codicil for a particular purpose, but thereby also re-devised the residue to his daughters, omitting the words of severance, the codicil was construed by the will, and they took as tenants in common.

Mathews v. Bowman, 3 Anst. 727.‖

(F) What Words create a Joint-tenancy, and not a Tenancy in common, *et e converso.*

As to the words which create a joint-tenancy, and not a tenancy in common, we must distinguish between the operations words have in a conveyance, and in a last will or testament, in which the intention of the testator is chiefly to govern. If, therefore, an estate be given to *two equally divided*, or *equally* (*a*) *to be divided*, these words in (*b*) a conveyance do not make them tenants in common, or sever the joint-tenancy, which was at first jointly conveyed to them.

2 Roll. Abr. 90; 3 Co. 39; 2 Vern. 323. (*a*) That there is no difference where it is two *equally divided*, and where to two *equally to be divided.* 2 Vent. 365, 366; Show. P. C. 210. (*b*) Copyhold lands were surrendered to the use of A, B, and C, and their heirs, *equally to be divided between them and their heirs respectively;* and Gould and Turton, Justices, held it a tenancy in common, by reason of the apparent intent of the parties; but Holt, C. J., held it a joint-tenancy, and that the word *equally* imported no more than to have alike; and as to the word *divided* he held, that did not import a tenancy in common, for their possession must be entire *et pro indiviso;* to divide would be to destroy it; and it is strange to create an estate from a word which implies only what would destroy it. Fisher v. Wigg, Salk. 391, pl. 3; Ld. Raym. 622; Com. Rep. 88; 3 Salk. 206, 13; 12 Mod. 296. But this case being cited Mich. 1730, *in Canc.* in the case of Stringer and Phillips, was said to have been reversed, according to Lord Holt's opinion. [But Lord Hardwicke says, in Rigden v. Vallier, 2 Ves. 256, that upon search, he could not find that this judgment was reversed, or that a writ of error was brought. And in cases of surrenders of copyholds, it seems to be an acknowledged authority. Rigden v. Vallier, *ubi supr.;* Goodtitle v. Stokes, 1 Wils. 341; Denn v. Gaskin, Cowp. 660.] ‖ But *qu.* the authority of the case of Fisher v. Wigg, seeing that a surrender of copyhold lands is to be construed as a conveyance at common law, as Lord Hardwicke himself determined in Lovell v. Lovell, 3 Atk. 11, and that a surrender of copyhold lands to uses is not to be considered on the foot of a use or trust, but strictly as a common law conveyance, as Holt, J. C., held, and Lord Hardwicke admitted, 2 Ves. 257, and that the words "equally to be divided" do not in a common law conveyance make a tenancy in common, as is uncontroverted. See 1 Walk. Copyh. 110. See also *supr.* vol. ii. 402.‖

Therefore it hath been holden, that in case of a conveyance, there are but two ways of making a tenancy in common: 1st, either by limiting the estate to take expressly as tenants in common: or, 2dly, by limiting a moiety, or a third, or other undivided part to one, and the other moiety or a third to another, &c., and that the words *equally divided*, or *equally to be divided*, would not create a tenancy in common in a deed; but they should be joint-tenants where the chance of survivorship is equal, and that chance is the meaning of the words *equally to be divided*, or an equal perception of the profits.

Stringer v. Phillips, 1730, at the Rolls, *infr.*

Also, if a man make a feoffment in fee of 20 acres to A and B, *habendum* one moiety to A and the other moiety to B, this *habendum* makes them

tenants in common; for though the premises be joint, and therefore of themselves would operate to give a joint estate and possession, yet the *habendum* explaining the manner of possessing, is not inconsistent or repugnant, because it makes no division of that undivided possession which was given in the premises.

Lit. § 298; Hob. 172. || Lord Coke, in his comment on this passage, says, the reason is, because they have several freeholds, and an occupation *pro indiviso;* and that the *habendum* severs the premises, that *primâ facie* seemed to be joined: for an express estate controls an implied one. Co. Lit. 190 b. See Ward v. Everett, 1 Ld. Raym. 422; 5 Mod. 25, S. C.; Carth. 346, S. C.; Comb. 329, S. C.; 12 Mod. 227, S. C.||

But, if a man conveys his house and four farms to trustees upon trust that his two sisters may cohabit in the capital house, *and equally divide the rents and profits of the four farms betwixt them, and the whole to the survivor of them*, this shall be a joint-tenancy; for although the words *equally to be divided betwixt them* do sometimes in a will make a tenancy in common, yet it is only by way of construction, and in compliance with the intent of the testator.(*a*)

2 Vern. 323, Clerk v. Clerk. (*a*) [For if the context of the will manifests a contrary intention, these words will not have that effect. || And so it did in the principal case, where it was adjudged that the limitation to the survivor would oust such a construction, even in a will.|| So, where a testator devised the residue of his estate to trustees, in trust to pay the interest and profits thereof to his four grand-daughters, equally between them, share and share alike, for and during their respective natural lives; and after the decease of the survivor of them, in trust to pay the principal money to and among the children of his said grand-daughters, equally to be divided between them, share and share alike; and two of the grand-daughters died leaving children; it was holden that the two living grand-daughters took the whole interest by survivorship, for that notwithstanding the words "equally to be divided, share and share alike," the context showed that a joint-tenancy was intended, as the interest was to be divided amongst four whilst four were alive; amongst three, whilst three were alive; and nothing was to go to the children whilst any of their mothers was living. Armstrong v. Eldridge, 3 Br. Ch. Rep. 215.—But it is not only in wills, that the words "equally to be divided," import a tenancy in common: they admit of the same construction in deeds, which receive their operation from the statutes of uses. Fisher v. Wigg, 1 P. Wms. 14; Rigden v. Vallier, 2 Ves. 252; and 3 Atk. 371; Goodtitle v. Stokes, 1 Wils. 341; Denn v. Gaskin, Cowp. 660. It is otherwise in common law conveyances. Stones v. Hartley, 1 Ves. 165. For although deeds to uses must be construed like common law conveyances, as to words of *limitation*, yet Lord Hardwicke said, that as to words of *regulation or modification of the estate*, he saw no harm in construing them differently. Rigden v. Vallier, 2 Ves. 257. But this doctrine, that deeds of uses are to receive a different construction from common law conveyances, hath been impugned by a late decision. Stratton v. Best, 2 Br. Ch. Rep. 233; 4 Cruise, Dig. 357, S. C. See too Staples v. Maurice, 7 Br. P. C. 48.] Tapner v. Merlott, Willes, 177; Doe v. Morgan, 3 T. R. 765; the words of Lord Kenyon, and Mr. Sugden's note (1) p. 143, in his edition of our author's "Law of Uses and Trusts," and Mr. Sugden's Treatise on Powers, 463.

Thus a devise to two *equally, and their heirs*, was holden to make them tenants in common; for in a will the intention of the testator is to govern, and no words which have a meaning and tend to illustrate his intention can be rejected; and therefore, the word *equally* must be construed to have been inserted to make them tenants in common, else it can have no meaning at all. And in this case it was said by one of the judges, that if the word *equally* had come after the devise to the two and their heirs, it had been more strong to make them tenants in common.

Moore, 558, Lewin v. Cox, adjudged in the Exchequer-chamber by five judges against two. Cr. Eliz. 443, 695, S. C. but said to be affirmed in the Exchequer-chamber by four judges against three. And vide Dyer, 25 a, in margin, and 2 Roll. Abr. 89, several cases to this purpose. See also Thickness v. Vernon, 1 Vern. 32, and 2 Ves.

(F) What Words create a Joint-tenancy.

256; Cowp. 657; {9 East, 276, 3 Ves. J. 629, Morley v. Bird. So, if to two *in equal moieties*. 5 Ves. J. 208, Harrison v. Foreman.}

So, a devise of several houses to five, their heirs and assigns, *all of them to have part and part alike, the one to have so much as the other*, was holden a tenancy in common.

Lit. Rep. 46, Jaques and Thoroughgood v. Collins; Cro. Car. 75, S. C. adjudged; Hetl. 29, S. C.

|| So, on a devise of a messuage, with the appurtenances, *unto M and G, equally to them*, Lord Mansfield said, there was no room for argument; *equally* implied a division; whereas if they were to take as joint-tenants, there would be no division.

Denn v. Gaskin, Cowp. 657.||

So, where a man devised to his wife for life, *and after her decease to his three daughters, to be equally divided, and if any of them die before the other, then the survivors to be her heirs, to be equally divided; and if they all die without issue, then to others, &c.*, it was holden, that the daughters were not joint-tenants, but that they had several inheritances in tail.

Kings v. Rumbald, Cr. Ja. 448; Roll. Abr. 833, S. C.; 2 Roll. Abr. 89, S. C.; 3 Co. 39, S. P. resolved. 3 Mod. 210, S. C. cited, and like point resolved.

So, if a man devise lands *to his two sons and their heirs for ever, and the longer liver of them, to be equally divided between them after his wife's death*, this shall be a tenancy in common in the sons: adjudged by three judges (*a*) against one, and that the latter words being in a will shall control the former.

Blisset v. Cranwell, 3 Lev. 373; Salk. 226, S. C. [(*a*) The opinion of the three judges hath been confirmed by Lord Hardwicke in Stones v. Heartly, 1 Ves. 165. But, where a testator devised lands to trustees and their assigns, till A and B attain twenty-one, to receive the rents, and apply them to their maintenance; and then to A and B for their lives, without impeachment of waste, and from and after their deceases to the use of the heirs of A and B as tenants in common, and not as joint-tenants; it was holden, that A and B were joint-tenants for life. Trodd v. Downs, 2 Atk. 304.]

|| So, under a devise of two leasehold houses to J P and J H followed by these words: *My will and meaning is, that the rents of my two said houses shall be equally shared and divided between them the said J P and J H as aforesaid*, it was holden that the devisees took as tenants in common.

Prince v. Heylin, 1 Atk. 493.||

[So, a devise to and amongst all the children *respectively*, male or female, of the testator's brother and sister, hath been holden to make a tenancy in common by reason of the word *respectively*. It appears indeed from a later case, (*b*) that the word "amongst" would of itself sever the interest.

Heathe v. Heathe, 2 Atk. 131. So Torrett v. Frampton, Sty. 434. (*a*) Trundell v. Eames, before Lord Bathurst, 11th Feb. 1773, cited in 4 Br. Ch. Rep. 17; {3 Ves. J. 629, Morley v. Bird.}

So, where a testator devised an estate in trust for his three sisters, and *as they should severally die, he gave the premises to their several heirs;* Lord Hardwicke held, that the words, *as they severally die, &c.*, imported a tenancy in common.

Shepard v. Gibbons, 2 Atk. 441.

So, where there was a devise of the profits of freehold and leasehold estates, in trust for the testator's six younger children, to be distributed among them *in joint and equal proportions;* it was holden that the children took as tenants in common; that the word "joint" was not

to be considered as giving a joint interest; but the same as if the testator had said, "to my children *all together.*"

Ettricke v. Ettricke, Ambl. 656.

So, where a sum of money was bequeathed to two persons, *jointly and between them;* the words "between them" were adjudged to sever the interests, and prevent survivorship.

Perkins v. Baynton, 1 Br. Ch. Rep. 118. ‖ In this case, which was determined by Lord Thurlowe, his lordship is said to have expressed a doubt, whether a legacy is a subject upon which a joint-tenancy can attach. But it was not the point then before his lordship; for the question merely was, whether there was a severance or not; and he made no such doubt in subsequent cases, particularly in that of Jolliffe v. East, 3 Br. Ch. Rep. 25, where, on the contrary, he expressly gives his opinion, that it is a joint-tenancy, or a tenancy in common, according as there are words of severance or not. See also Billingsley v. Shore, 1 Vern. 482. Sir T. Jones, 162, which was a case of mere residuary legacies. "Upon the doubt Lord Thurlowe expressed," says Lord Eldon, "whether there could be a joint-tenancy of a money legacy or a residue, and the cases cited of distinctions attempted upon the question, where the residuary legatees were executors, I looked at some of the original wills in Doctors Commons, where a construction had been put upon them; and I made up my mind upon the point, upon which I have never had any doubt since, that a simple bequest of a legacy or a residue of personal property to A and B without more, is a joint-tenancy: and it is upon the other side to show from some part of the context, applying to that bequest, that the words are not to have their legal operation." Crooke v. De Vandes, 9 Ves. 204.‖

But, where a testator gave two-thirds of a residue *unto and amongst* the children of A and B, and the remaining third *to* the children of C, it was holden, that though the children of A and B took as tenants in common, yet that from the omission of the words of severance in the bequest to the children of C they took as joint-tenants.

Campbell v. Campbell, 4 Br. Ch. Rep. 15.]

‖ So, where a testator bequeathed to his daughter Elizabeth all his freehold houses and lands at A, with all his money in the stocks, mortgages, debts, &c., goods and chattels, "and every thing I die possessed of, I give all to her only use and pleasure for ever, on condition that she do pay to the four daughters of my brother J C 400*l.* out of 700*l.*, now lying in the 3 per cent. consolidated;" and three of those daughters died in the lifetime of the testator; it was holden to be a joint legacy, and, consequently, that the whole survived to the survivor; for there are no words of severance.

Morley v. Bird, 3 Ves. 628; Stuart v. Bruce, Ibid. 632, S. P.; Whitmore v. Trelawny, 6 Ves. 129.

A testator desired all the rest and residue should be divided between two. By the master of the Rolls.—This must be understood to be equally divided; and by death of one in the lifetime of the testator this moiety shall not survive to the other devisee of the residue, but be considered as undisposed of by the will, and divided between the next of kin, as if no devise had been thereof.

Peat v. Chapman, 1 Ves. 542; Owen v. Owen, 1 Atk. 491.

Where a bequest in the form of a letter addressed to the testator's mother and sisters was expressed thus: "to be divided amongst *you;*" it was construed to be a tenancy in common, as the testator evidently meant all those to whom the letter was addressed, that is, the mother and then living sisters; and the shares of those, who had died in the testator's lifetime, were consequently lapsed.

Ackerman v. Burrows, 3 Ves. & Beam. 54.‖

A man having three sons, William, John, and Daniel, and lands in D, S, and E, devised his lands in D to his son John and his heirs, and his lands

in S to his son Daniel and his heirs, and devised that his wife should have all his freehold lands for five years, paying 10*l.* a year to John, and 6*l.* a year to Daniel; and if either of his three sons died before the five years expired, then to be divided equally by them that should be living: William and John both died during the five years; and it was holden, that William's part, who died first, should be divided betwixt John and Daniel, and they should be tenants in common thereof; but it was likewise holden, that when William was dead, and his part divided, that that clause was executed, so that upon the death of the second, the will would not carry his part to the third.

Hill. 15 & 16 Car. 2, in B. R. Ride v. Atwick; Keb. 692, 754, 773, S. C., but states the terms of the will differently.

In trespass for breaking and entering the plaintiff's close, it was found by special verdict, that A was seised in fee of such a place, whereof the close in question was parcel, and being so seised, made his will in writing, wherein *inter alia*, he gave to Jane the wife of B, and to Elizabeth the wife of C, all his estates, &c., *to be equally divided between them, during their natural lives, and after the deceases of the said Jane and Elizabeth to the right heirs of Jane for ever;* and found further, that the said Jane and Elizabeth were heirs at law to the said A, and that after the death of A their husbands entered in their rights; that Jane died before the trespass, one of the defendants being her issue and heir, and that C entered into the whole in right of Elizabeth his wife, and let to the plaintiff, and thereupon the defendant entered; and the only question was, whether this devise made Jane and Elizabeth joint-tenants for life, so as upon the death of Jane the whole survived to Elizabeth for life; or whether upon the words *equally to be divided between them*, they were tenants in common, so as a cross remainder of the moiety was not to go to the heirs of Jane till after the death of Elizabeth. And it was argued for the plaintiff, that though the words *equally to be divided* do often in a will make a tenancy in common, yet it is not so much the words themselves, as the intention of the testator, that makes such an estate; for they have no force of themselves to make such an estate, but according to the intent of the testator; for a joint-estate is equally liable to be divided with an estate in common. 1 Inst. 186. And one joint-tenant has no more than a moiety to grant, to charge or to dispose of; and therefore the words *equally to be divided* are no more than what the law implies; and the only difference between joint-tenants and tenants in common is the conveyance by which they claim. Lit. sect. 292, 298. And in this case, being in a will, if it had gone no further than to be equally divided between them, it was agreed it would have been a tenancy in common. Styl. 211; 2 Roll. Abr. 89, 90. But here was a manifest intent that it should go to the survivor; for it is limited after the deceases of the said Jane and Elizabeth to the right heirs of Jane; which is as if he had said to them, and the survivor of them, for their lives; for the right heirs of Jane are to take nothing till Jane and Elizabeth's death, and they are to take the whole estate at the same time, and not one moiety at one time, and another at another; and if his intent had been so, he would have said so, viz., and after the decease of them, or either of them; for in such case, if the devisees should take as tenants in common, the remainder in the one moiety must be contingent; so that if the tenant in common in fee should survive the other tenant in common for life, the remainder to the right heirs of Jane will be void as to the other moiety, and there is no other way to make the whole devise good, but by making them joint-tenants for

life. And admitting they were tenants in common, yet the defendant has no title but to the moiety till after both their deaths, which has not happened, Elizabeth being still living; and to this purpose were cited Moore, 7; 4 Leon. 14; Holmes v. Meynel, Sir T. Jones, 172; Raym. 452, S. C. Trin. 6 Annæ, in B. R. Tuckerman v. Jeffries; 11 Mod. 108, S. C.; Holt, 370, S. C.; 1 Str. 15, S. C. cited.

On the other side it was argued, that they were tenants in common, and that in a will the words *equally to be divided between them* have been always construed to make a tenancy in common, because of the intent of the testator, which in a will is chiefly to be regarded; as, if one devise lands to one and his assigns for ever, this passes a good estate in fee. Besides, in this case there was no intent to make them joint-tenants; for there are no words of survivorship; for the words *after the deceases of the said Jane and Elizabeth*, are no more than what the law would have implied, for it could not take effect otherwise for the whole, as it will do when it is limited to a stranger, and his heirs, and if he die without issue, then to B.; and these words in the principal case do not carry a necessary implication that they should be joint-tenants; for in the mean time it may descend to the heir at law, as to a moiety; and the reason why *equally to be divided* makes a tenancy in common in a will is because otherwise those words would be idle, for they import a division in the interest. 3 Lev. 373; Styl. 434; Bendl. and Dalis. 77.

Holt, C. J., pronounced the opinion of the court, that they were joint-tenants, notwithstanding the words *equally to be divided between them*, and the lands ought to survive to Elizabeth: 1st, For though upon such words generally they are tenants in common, yet, if it should be so in this case it would be expressly against the intent of the testator, and would defeat the heirs of Jane of part; for they are to take all together, (*a*) and not by moieties, one, at one time, and one, at another, but all at once; and if they should be tenants in common, they must take by moieties at several times. 2dly, It is express that the heirs of Jane are not to take till after both their deceases. 3dly, If they should be tenants in common, then the heirs of Jane would be in danger to lose a moiety; for as to that one moiety, it must be a contingent remainder; so that if Elizabeth should die during the life of Jane, the contingency for that moiety not happening, it must descend to the heirs at law of the testator, who are Elizabeth and the issue of Jane, as coparceners. 4thly, Jane and Elizabeth are heirs at law to the testator, and as such the whole would have descended to them in coparcenary, if no will had been made; but here by this will it is plain the testator intended to prefer the heirs of Jane to the whole. And it was adjudged for the plaintiff.

(*a*) || So, in a late case, where lands were devised, after an equitable estate for life, to the testator's niece, for the use of the heirs of her body lawfully begotten, or to be begotten, their heirs and assigns for ever, without any respect to be had or made in regard to seniority of age, or priority of birth; the court of K. B. held, that they took as joint-tenants, because they were to take together, without regard to seniority of age, or priority of birth. Doe v. Ironmonger, 3 East, 533; 1 N. R. 91.||

|| Andrew Hawes, the plaintiff's grandfather, devised several lands to his four younger sons, William, Charlton, Andrew, and Thomas Hawes, their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, with benefit of survivorship; and also devised all his messuage in Chatham unto his-said four children, their heirs and assigns for ever, equally to be divided, share and

share alike, as tenants in common as aforesaid, and not as joint-tenants, with like benefit of survivorship; and died, leaving his eldest son, Harewell Hawes, and the four other sons. In 1727, Charlton Hawes died an infant and unmarried; and some time after, Harewell Hawes, the eldest son, and his wife, by fine and recovery conveyed, *inter alia*, the undivided fourth which had belonged to Charlton, of the lands devised by his father, to the use of such persons, and for such estates, as he and his wife should appoint; and for want of such appointment, to the use of himself for life, remainder to his wife for life, remainder to his own heirs and assigns. In 1728, no appointment being made, Harewell Hawes by will devised all his freehold lands to trustees, in trust to sell so much as should be necessary in payment of all his debts; and what should remain unsold, he directed his trustees to convey equally to his three children, the plaintiff Nathaniel, Martha, and Elizabeth one of the defendants, and their heirs for ever, as tenants in common, or to the survivors and the heirs of such survivors, at their ages of twenty-one years; and the rents and profits, after his wife's decease, to be had and received towards the education and bringing-up of his said three children during their minorities: and gave his personal estate equally between his three children and his wife, whom he made executrix; and died, leaving the plaintiff his son, and his two daughters, Martha and Elizabeth, the first of which, Martha, died an infant in 1740, and unmarried. The plaintiff having attained his age of twenty-one, brought his bill to be let into the undivided fourth of his uncle Charlton, which he insisted did, by Charlton's death, descend upon his father, Harewell Hawes, as heir to Charlton, and was well conveyed by his father to the plaintiff by the above settlement and will; and also to be let into the share of his sister Martha, of their father's real estate; insisting, that she dying before twenty-one, the share of their father's real estate intended her, upon the happening of that contingency, was now a resulting trust for the benefit of the plaintiff, as heir at law to the father; or, that if any thing was actually vested in her, she had it as tenant in common, and upon her death it descended to the plaintiff, as her brother and heir. Lord Hardwicke held, that the estate devised to the four younger sons by the grandfather's will, was a tenancy in common, with a limitation to the survivors, after the death of any of them before twenty-one without issue; and, consequently, that the share of Charlton descended to the surviving younger children. And as to the question arising upon the will of Harewell Hawes, his lordship held, that the share of Martha, upon her death under twenty-one, did not descend to her heir at law, but survived; and that the first clause was to be construed in the same manner as if that relating to the rents and profits had been placed before it; that the will must have the same construction wherever the clauses were placed; and placing them as he just then did, there would have been a joint-tenancy during their minorities; and if one died under age, his or her part would not descend, but survive to the others, and go towards their maintenance.

Hawes v. Hawes, 6 Cruis. Dig. 419; 1 Wils, 165, S. C.; 3 Atk. 524, S. C.; 1 Ves. 13, S. C.‖

A devised lands to trustees, and their heirs, in trust *that the profits should be equally divided between his wife and daughter during the wife's life, and after her death he devised the same to the use of his daughter in tail with remainders over;* the daughter died during the mother's life; it was holden in (*a*) Chancery, (*b*) that this was a tenancy in common, and

should go to the administrator of the daughter during the mother's life, and should not be a resulting trust for the benefit of the heir.

Phillips v. Phillips, 2 Vern. 430; Pr. Ch. 167, S. C.; 1 P. Wms. 34, S. C. (*a*) It was holden to be so in this case at law by the Court of Common Pleas, to which court the point was referred. (*b*) Vide 2 Vern. 556, where it is holden, that survivorship must take place as well in equity as at law.

J S devised a term for years, and all her interest therein *to her two daughters, they paying yearly to her son* 25*l.* *by quarterly payments*, viz.: *each of them* 12*l.* 10*s.* *yearly out of the rents of the premises during his life*, if the term so long continued; and my lord chancellor held it clearly a tenancy in common, the 25*l.* being to be paid by the two daughters equally in moieties.

Kew v. Rouse, 1 Vern. 353.

|| A father bequeathed all his personal estate to his sons A and B their executors, administrators, and assigns for ever, charged with the payment of legacies to his daughters, and an annuity to his wife, with a direction that B should, during his minority, be maintained and educated out of the fund, and that if he should wish to be put out apprentice, a competent sum should be raised out of the fund, as an apprentice-fee for his use, and *in part of the share to which he would become entitled in the surplus;* it was clearly holden that the further provision for apprenticing B was quite inconsistent with a joint-tenancy; and the words "in part of the share" were alone decisive of the testator's intention, that it should be a tenancy in common.

Gant v. Laurence, 1 Wightw. 395.||

A man having a mortgage for years makes his will, and thereby devises all his personal estate, of what nature soever, to his executors, in trust for the payment of his debts, and afterwards devises the residue and overplus of his personal estate *to his two daughters, equally to be divided between them*, and dies; the debts being satisfied, the daughters contract with the mortgagor for the purchase of the equity of redemption to them and their heirs; one of the daughters devises her share and interest to the plaintiff, and dies; and it was holden, that this purchase of the equity of redemption and inheritance was a tenancy in common, the mortgage devised to the daughters being so, and the purchase being founded on the mortgage.

Edwards v. Fashion, Eq. Ca. Abr. 292; Pr. Ch. 332, S. C.

J S devised his leasehold house to his wife for life, and after her death he devised it *to A and her three sons equally amongst them;* and it was decreed, that they took it as tenants in common, though there was no mention of any division to be made.

Abr. Eq. 292; Warner v. Hone, Eq. Ca. Abr. 292; Pr. Ch. 491, S. C.; Gilb. Eq. Rep. 146, S. C.

A man assigns a term to trustees, in trust to permit himself to receive the profits thereof during his life, and after his death in trust to permit his two daughters B and C, their executors and administrators, to receive the profits during the residue of the term, *equally to be divided between them, they paying so much within two years to his two daughters:* it was holden, that this being a trust of a personal thing, they were tenants in common, the father's intention appearing to be to make several and distinct provisions for his two daughters; and paying the sums appointed to the sisters makes them purchasers.

Pr. Ch. 163, Hamel v. Hunt.

(F) What Words create a Joint-tenancy.

One devises 200*l.* to be laid out in the purchase of lands, and settled by trustees to the use of her daughter, and the heirs of her body, and if she died without issue, then to the use of the children of A (who then had issue B and C;) the daughter died without issue before the money was laid out, after whose death the trustees laid out the money in a purchase of lands, and settled the same on B and C jointly in fee according to the will, who accordingly enjoyed the same for some time; and one of them dying, it was holden that this was a joint-tenancy, which went to the survivor. But it is said to have been holden by the court, that if the money had not been actually laid out in a purchase, the survivor would have been entitled to a moiety only.

Carth. 15, *in Can.* Vide head of *Trusts.*

Also it is said, that if 500*l.* apiece is devised to two legatees, who take a mortgage jointly to them both, for securing the payment of their legacies with interest, and one of them dies, the other shall have nothing by survivorship, because in this case the mortgagees are trustees for each other, and the mortgage, which is only as a security, makes no alteration in the case.

Carth. 16.

[The Earl of Suffolk bequeathed 20,000*l.* to his brothers George Howard and Henry Howard, and to the four children of Henry, equally to be divided between them share and share alike; and if either of them die, to the survivors or survivor of them. George survived the testator, but died before any part of the money was paid; and a question was made, Whether his share should go to his representatives, or be divided between the survivors? Lord Cowper held, that the interest in this share was vested in George by his surviving the testator, and of course transmissible to his representatives. He said, by the first words, "share and share alike," it was plain the legatees were tenants in common; and by the subsequent words, "that if any of them die, his share shall go to the survivor," it must be intended, if any of them should die in the lifetime of the testator; for by that construction every word of the will would have its effect and operation. But this decree was reversed upon an appeal to the Lords, their lordships being of opinion, that the time of survivorship related to the time when the debt should be paid, not to the death of the testator, and that George not having lived to that time, the surviving legatees were entitled to his share.

Lord Bindon v. Earl of Suffolk, 1 P. Wms. 96; 1 Br. P. C. 189. This decision of the Lords seems to have been impeached in the case of Stringer v. Philips, next following; and later judges have expressed a doubt of the ground upon which their lordships proceeded. However, the circumstances of the case, it should seem, would bear out the decree of the Lords. 2 Ves. jun. 638. The sum bequeathed was an old debt from the crown secured upon the hearth-money revenue, which was taken away by statute. It was an unproductive fund till payment, and could be of no use to any one. That was an event depending upon interest and solicitation, and was extremely retarded by the consideration of its going to representatives. From these circumstances, therefore, the words should seem to relate to the time when the debt should be paid.]

One devised 100*l.* to five, *equally to be divided between them and the survivors and survivor of them*, and if A (one of the five) died before marriage, her share to go over to another person: it was decreed, that they took this 100*l.* as tenants in common, and that the words *and the survivors or survivor of them* to make them joint-tenants would be a contradiction to the first words, whereby they were made tenants in common, and that they should be construed to extend only to such as were survivors at the death of the testator, and thereby inserted to prevent a

lapse; and this is the stronger by the limitation over of A's share upon a contingency, by which it is plain the testator did not intend her to be a joint-tenant with the rest, and as the devise was to all five, they must all take alike, and not A be tenant in common, and the other four joint-tenants.

Abr. Eq. 292, 293, Stringer and Philips, at the Rolls. [The words of the decree in this case are these. "His honour declared, that the devise of the said 100*l*., after the death of the said testator's sisters Lucy and Katharine, unto the said Margaret Wiskey, Mary Harris, Elizabeth Tucker, Mary Parker, and Alice Stringer, to be equally divided between them, and the survivors, and survivor of them, is a tenancy in common, and not a joint-tenancy, and that the words *survivors and survivor of them*, are to be understood of such of them as shall be living at the testator's death." Reg. lib. 1730, fol. 177. In wills, the courts have been astute to construe *survivorship* into some other meaning than a joint-tenancy, and have therefore laid hold of some particular time. In Lord Bindon v. Earl of Suffolk, 1 P. Wms. 96, Lord Cowper, as we have seen, referred it to the death of the testator, as in the above case of Stringer v. Philips: but the House of Lords referred it, from the nature of the debt which was the subject of the bequest, to the time of payment; concurring with him however, in the propriety of some particular time. 1 Ves. 14. In Haws v. Haws, 3 Atk. 524, and 1 Ves. 14, Lord Hardwicke fixed the time to the devisees dying under twenty-one, there being a precedent clause in the will in which the testator had made a similar disposition of his personal estate, and given the benefit of survivorship at that period. In that case, Lord Hardwicke is made to say, that the construction of Lord Cowper in Bindon v. Suffolk, was too nice, though if no other reasonable construction could be put on the words, the court ought to resort to it. That construction, however, hath been adopted in later cases, where the words "survivors and survivor" have been holden to relate to the death of the testator.] ‖ The principle is, that in order to reconcile the inconsistent words, some era must be found to which the words of survivorship are to be referred. The death of the testator is never resorted to, but where no other period can be fixed upon. It is an unnatural construction certainly; for the testator supposes the legatee will survive him. Russell v. Long, 4 Ves. 351; Brown v. Bigg, 7 Ves. 286. However, says Sir James Mansfield, C. J., in Garland v. Thomas, 1 N. R. 91, all the cases plainly show that in a devise of personal estate, the plain sense of which is to give a tenancy in common, the word "survivorship" must be taken to mean a survivorship at the death of the testator.‖

[A testatrix gave stock to trustees upon trust to pay the dividends to her niece for life, and after her decease that the stock should be equally divided between the brother and four sisters of the testatrix, "and in like manner between the survivors or survivor of them." Lord Loughborough, adopting Lord Cowper's idea in Bindon v. Suffolk, held that the words "survivors or survivor" related to the time of the testatrix's death, in order to prevent the lapse of a share by the death of a legatee in her lifetime: that therefore this was a tenancy in common between those who were alive at the death of the niece, and the representatives of those who died in her lifetime.

Roebuck v. Dean, 2 Ves. jun. 265; 4 Br. Ch. Rep. 403, S. C.; Maberly v. Strode, 3 Ves. 450, S. P.

A testator bequeathed stock to trustees upon trust to pay the interest to A for life, and after her decease to her children; but in case she should die leaving no children, to B and C, share and share alike, or to the survivor of them. B died in the lifetime of A, and then A died without issue. The interest vested in B and C upon the death of the testator, as tenants in common, and upon the death of A became divisible in moieties between C and the representatives of B.

Perry v. Woods, 3 Ves. 204.]

‖ Where a person devised lands to his five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common and not as joint-tenants; it was contended, that this was a tenancy in common among the five children for

life, with a survivorship to the longest liver of them; but the Court of K. B. were unanimous that it was a tenancy in common in fee; and that the words "survivors and survivor" related to the death of the testator.

Rose v. Hill, 3 Burr. 1881.

So, on a devise of an estate to trustees and their heirs, to the use of the testator's nieces, A B and C, and the survivor and survivors of them and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint-tenants, and for want of such issue remainder over; upon a case sent by the master of the Rolls for the opinion of the Court of Common Pleas, the judges of that court certified that the devisees took as tenants in common.

Garland v. Thomas, 1 N. R. 82.

J S seised in possession of some freehold lands, and entitled in reversion to others, made his will in these words: "*Imprimus*, my mind and will is, that all my debts and funeral expenses be paid out of my whole estate; and whereas I am entitled to divers freehold messuages, lands, and tenements, at the decease of my aunt M, I hereby give the said premises, as my other estates, to A, B, and C, and their heirs, upon trust that at the decease of my aunt M what my personal estate shall not extend to pay, they shall, by sale or mortgage of any part of my real estate, raise so much money as shall pay off all my just debts; and I hereby order, and my mind is, that the remainder of my estate shall go to, and be equally divided amongst my three children, Dinah, Frances, and Mary, and the survivor of them, and their heirs for ever. And I do hereby order the guardianship of my son John, as well as of my other said three children, to my wife; and will that she shall educate them out of the rents and profits of their several estates and fortunes given them and settled upon them by this my will, or otherwise howsoever." The question being, whether, under this will, the three daughters take as joint-tenants, or tenants in common, Lord Hardwicke held, that they each take a separate share.

Stones v. Heartley, 6 Cruis. Dig. 429; 1 Ves. 165, S. C.

A testator devised all his real estates to trustees; as soon as his three daughters should attain their respective ages of twenty-one, to convey to them and the heirs of their bodies, as joint-tenants. Lord Hardwicke, after observing that, on account of the direction to convey, this was an executory trust, in which case the court assumed greater latitude of moulding the will according to the intention of the testator, gave his opinion, that the daughters did not take as joint-tenants; but that conveyances should be made to them at twenty-one respectively in tail-male, with cross remainders in tail; by which means survivorship would be preserved upon the death of any daughter without issue, which was the most that was meant by joint-tenants.

Marryat v. Townly, 1 Ves. 102; 6 Cruis. Dig. 428; 5 Ves. 749.

By articles made previously to the marriage of W T with R F; the father of W T bound the whole of a leasehold farm of which he was possessed as a dowry or marriage-portion to his son W T along with R F, the one-half of the said farm to the right, title, and interest of the issue, whether son or daughter, if begotten on the body of R F by W T. The marriage took effect, and W T entered into possession, and died in 1792, (having been twice married,) leaving two children of the first marriage, the plaintiff, and a son (since deceased,) and five children of the second marriage. Lord

Redesdale said, that articles are not to be construed in the same manner as a formal disposition; that in the latter the court has nothing to rectify by; but in the case of articles, it has to consider what is the contract which the parties intended to enter into, and where the words are short or defective, to presume what was the probable intent; that though in Williams v. Jekyll, 2 Ves. 681, the words "to the use of his issue lawfully begotten" were held to create a joint-tenancy; yet that was the case of an actual conveyance; that it would have been otherwise, if it had been on articles or agreement; that joint-tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of their portions for their advancement, as the joint-tenancy cannot be severed; that if the parties had come into a court of equity shortly after the marriage to have a settlement made pursuant to the articles, the disposition would have been to the father for life, with remainder to the children as tenants in common, subject, perhaps, to a power of appointment in the father. His lordship therefore decreed, that this should be divided between the children of W T and R as tenants in common, and consequently, that as to one moiety of the moiety it should go to the plaintiff, and as to the other moiety, or the share of the son of the first marriage who had died, it should go by right of representation, among the children of the second marriage, together with the plaintiff.

Taggart v. Taggart, 1 Sch. & Lefr. 84; Torret & Frampton, Sty. 435.‖

[A testator devised a real estate to his heir at law and his issue male in strict settlement; remainder in trust to be sold, and the money arising from the sale to be equally distributed among the three sons and daughters of the testator's niece, or *the survivors or survivor of them.* Lord chancellor admitted it to be in general perfectly true, that these words of survivorship will not prevent the interest from vesting at the death of the testator: but in this case he was of opinion, that it was clearly the sense of the will that the produce of the sale was to be personal estate, that the children were to take it in money: there was to be no gift till distribution, that is, the death of the tenant for life without issue; the object of the distribution was pointed out to be among the persons named, or the survivors or survivor; so that that excluded the possibility of taking in persons who were then dead.

Brograve v. Winder, 2 Ves. jun. 634.

A testator directed by his will, that "in case both his sons M and I," to whom he had devised his estates, "should happen to die unmarried, and that neither of them should have any issue lawfully begotten, then his daughters M, S, and C, and the survivors and survivor of them, and their assigns, be permitted to receive all the rents, issues, and profits of all the said leases, lands, and premises, as tenants in common, and not as joint-tenants." The testator then gave legacies to his daughters, and added, "in case his said daughters M, S, and C, or any or either of them, should happen to die before their respective days of marriage, his will was, that the said fortunes to them respectively bequeathed as aforesaid should go to and be divided between his said sons, and the survivor of them, and to and among the survivors and survivor of them the said M, S, and C, share and share alike." All the devisees survived the testator. M the eldest son died unmarried, leaving his brother I, who upon his death became entitled to the whole interest in the testator's leasehold estates. M and S

both married after the testator's death, and both died in the lifetime of their brother I. Upon the death of I, C the surviving daughter claimed *all* the testator's leasehold estates and interests, which were accordingly decreed to her by the Court of Chancery in Ireland; but upon appeal to the Lords in this country, that decree was reversed; and it was declared that the estates, by virtue of the will, upon the contingencies which had happened, were well devised to the testator's daughters M, S, and C, as tenants in common; and that therefore they were to be equally divided between the surviving daughter and the representatives of the two, who were dead.

Wilson v. Bayly, 5 Br. P. C. 388.

A testator bequeathed 30,000*l.* to his executors in trust for the equal and separate use of his five daughters, equally among them and their respective children, being 6000*l.* apiece for each of his said daughters and their respective children, to be placed out at interest with the approbation of each of his said daughters respectively, as to her share. And if any of his said daughters should die, then the 6000*l.* given for the benefit of such daughter and her children should be in trust for her daughters and younger sons, in such manner, proportion, and to be payable at such time, as such his daughter so dying should by deed or will appoint; and for want of appointment, in trust for the daughters and younger sons equally between them, and to the survivors and survivor of them: and in case there should be no such daughter, or younger son, or all should die before 21 or marriage, then in trust that his daughter so dying should dispose of the 6000*l.* and interest to such of her sisters and younger children, and in such proportions, as she should then judge would have most occasion for the same: and for want of appointment, then in trust for all and every the daughters and younger sons of her sisters that should be living at her death, equally to be divided between them. J S, one of the daughters, made her will, and appointed the 6000*l.* among her children. Her children died in her lifetime, having respectively attained 21. The 6000*l.* vested in these children, on their attaining 21, so as to be transmissible to their representatives. The words "survivors and survivor" only meant to give cross remainders to the children before the devise over could take place.

Earl of Salisbury v. Lambe, Ambl. 383 ; 1 Eden, 465, S. C.

A testatrix, after making several devises and bequests to different persons, (among whom were A, B, and C, her executrixes,) declared it to be her will, that if any of her legatees should die in her lifetime, or before their legacies became due and payable to them or any of them so dying, the same should go and descend *equally* between her executrixes. By codicils the testatrix substituted D and E as executors in the stead of A, and F instead of B, with the same power, authority, and share of her estate, as A and B would have had with the other executors. One of the executrixes died soon after the testatrix, and one question was, Whether her share in the residue survived to the others, or went to her personal representatives, which depended upon, whether they took as tenants in common under the will, or as joint-tenants? The question was occasioned by the introduction of the word *equally* into the will. By Lord Thurlowe—The first clause in the will is certainly not sufficient to make the executors tenants in common; I never knew any construction carried so far. In giving the lapsed legacies the testatrix has used the word *equally*. Certainly the word *equally* has been held to give a tenancy in common, but

that is always with reference to the other parts of the gift. The general intent of the testator will overrule the word *equally* rather than the word *equally* shall overrule the general intent of the testator. From the whole of the words, I think the testatrix meant them all to be executors, with equal authorities and equal shares, and that they being now reduced to three, those three must take in equal shares.

Frewen v. Relfe, 2 Br. Ch. Rep. 220.

A testatrix bequeathed the residue of her personal estate to two grandsons and a grand-daughter, to be equally divided between them, share and share alike; the shares of the two former to be paid at twenty-one, and the share of the latter to be paid at the like age or marriage; and she directed, that if the grand-daughter should die before the time of payment, her share should be equally divided between the grandsons; and in case of the death of either of them, the whole should be paid to the survivor: and if either of the grandsons should die under twenty-one, his share should go to the surviving grandson: and if they all three died before the time appointed for the payment, the whole should go over. Both the grandsons died under twenty-one; but the grand-daughter attained that age. It was decreed, that she was entitled to one-third; and the representative of the surviving grandson to the other two.

Mackell v. Winter, 3 Ves. 236.]

||Where a testator devised lands to his three sisters for and during their joint natural lives, and the natural life of the survivor, to take as tenants in common, and not as joint-tenants; remainder to trustees, during the respective lives of the sisters and the life of the survivor, to preserve contingent remainders; and, from and after their respective deceases and the decease of the survivor, remainder over; it was holden by the court of K. B. that the sisters either took the estate as joint-tenants, to be regulated in its enjoyment as a tenancy in common; or as tenants in common with benefit of survivorship.

Doe v. Abey, 1 M. & S. 428.||

It seems to be the doctrine of the courts of equity, that where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, that this is a joint-tenancy,(*a*) that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other: but, where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners, and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others in proportion to the sums advanced by each of them. So, if two or more make a joint-purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien upon the land, and a trust for the representative of him that advanced it. And in all other cases of a joint undertaking or partnership, either in trade, (*b*) or any other dealing, they are to be considered as tenants in common, and the survivors as trustees for those who are dead.

Vide Vern. 33, 217, 361; Rigden v. Valier, 3 Atk. 731; 2 Ves. 258, S. C.; 3 Ves. 631; Partridge v. Pawlett, 1 Atk. 467; 2 Atk. 55, S. C.; Hall v. Digby, 4 Br. P. C. 224. {If they contribute to the purchase in equal proportions, and take a conveyance to them jointly, but by the recitals in deeds among themselves it appears that they intend to purchase as tenants in common, they will in equity be considered as such. 2 Cain. Er. 326, Cuyler v. Bradt.} ||(*a*) But *qu.* of this Lord Hardwicke says, (I cite

the words from the very correct report of Rigden v. Valier in 4 Cruis. Dig. 360,) "When mortgage-money has been lent by two persons in equal moieties, and the security taken to them and their heirs, the court has held no joint-tenancy to be intended by that conveyance. Indeed, in purchases, where the money has been advanced in like proportion, *it has been said to be* otherwise." His lordship evidently does not admit it to be otherwise; *it has been said* to be so. And *qu.* the difference: a mortgage is a purchase *pro tanto*.‖ (*b*) Vide *supra*, (C) 245. Vide Jackson v. Jackson, 9 Ves. 596; Lister v. Dolland, 1 Ves. jun. 434.

As, where the commissioners of sewers had sold and conveyed lands to five persons, and their heirs, who afterwards, in order to improve and cultivate those lands, entered into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum to be laid out in the manurance and improvement of the land; it was holden, that they were tenants in common, and not joint-tenants, as to the beneficial interest or right in those lands, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole estate.

Abr. Eq. 290, 291; Lake v. Gibson, 3 P. Wms. 158, S. C. by the name of Lake v. Cradock.

‖ Where a lease was made for ninety-nine years in trust for A and B, and upon A's death, his executor obtained an assignment of it from the trustee; and the administrator of B brought a bill to have the whole term by survivorship; Lord Cowper said, a trust of a term must go as the term at law would have gone; and as survivorship would have taken place at law, it must in equity.

Aston v. Smallman, 2 Vern. 556; Cray v. Willis, 2 P. Wms. 530.

So, where two joint purchasers of a lease for years assigned it to a third person, who was a friend of one of them, with the consent of the other; but without consideration, or any declaration of trust, as was acknowledged in the answer; it was holden, that though the right of survivorship was looked upon as odious in equity, yet in this case the trust should survive for the benefit of the surviving *cestui que trust* against the creditors of the deceased.

R. v. Williams, Bunb. 342.

M W, by will, devised certain estates in trust to pay 5000*l.* between his two daughters, or the survivor of them, and to be secured to them for life; then to the first and other sons in tail; then to their respective daughters in tail, with cross remainders: if there should be no issue, then to his two sisters or the survivor for life; and then sons and daughters in tail, with remainders over: and he gave all the rest of his fortune, real and personal, to his daughters, share and share alike, subject to debts, &c. The testator died, leaving his wife surviving. This was held a joint-tenancy for life, with several remainders; the words of severance being confined to the subsequent limitations.

Folkes v. Western, 9 Ves. 456.

Where the residue of real and personal estates was devised by a testator to his two sons as joint-tenants, and the two sons, after the father's decease, had during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other; it was held,

under the circumstances, that they continued, at the death of one of them, joint-tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates.

Morris v. Barrett, 3 Young. & J. 384.‖

(G) Of the Duration and Continuance of the Estate, whether given jointly, or in common: And therein, where the Inheritance shall be said to be joint or several.

If an estate is limited to husband and wife during their *joint* lives, this is no absolute estate for their lives, so as to go to the survivor; but the death of either of them determines that estate.

5 Co. 9; Sid. 247; Raym. 126.

If a man covenants, grants, demises, and to farm, lets land to A and B and the heirs of B, *habendum* to A and B for 300 years, this is but a term for years in A and B though there be words of inheritance; for it was plainly the intention of the lessor to create a term only by his using the common words of demise. Besides, the lessees by the premises could have but an estate at will, because the words of inheritance in the premises of the deed were not sufficient to carry the freehold without livery, which was not made in this case.

2 Co. 23, 24, Baldwin's case; And. 223; Owen, 48.

If a lease be made to A and B for their lives, and the life of the longer liver of them, and they make partition, and then A die, the lessor shall enter into his part, and there can be no occupancy; for B has no title to it, because the right of survivorship was lost by the partition, which destroyed the joint-tenancy: nor will the words *to the longer liver* be of any use to B, because they were void at first, being no more than the law implied in their joint-estate; nor can there be any occupancy, because after the partition each of the lessees hath but an estate for his own life in his respective moiety, and, consequently, the reversion, which is to commence when the particular estate determines, must necessarily take place.

2 Roll. Abr. 150.

If a lease be made to two, and to the heirs of one of them, they are joint-tenants for life, and one has a freehold, and the other a fee; and if he that has the fee die, the survivor shall hold the whole during his life.

Lit. § 285.

If lands be given to two men and the heirs of their bodies begotten, they have but a joint-estate for life, and several inheritances; for though the gift be limited to the descendants of their bodies, yet it being impossible there should be one descendant of both their bodies, they cannot have a joint estate-tail.

Lit. § 283.

So, if lands be given to one man and two women, and the heirs of their body begotten, they have a joint-estate for life, and several inheritances, because there can be no one issue of both of the women's bodies; and if the man should marry one of them, yet it is not limited in the donation which of them, in case of such intermarriage, should first take.

Co. Lit. 184 a.

So, if land be given to two men, and their wives, and the heirs of their bodies begotten, they have a joint-estate for life, and several inheritances, but no joint-estate in tail; because though the husband and the wife of the other may die, and the survivors may marry, yet the gift being made to

them all, and the heirs of their bodies, it is impossible that there should be one heir or descendant of all their bodies, and therefore it can be no joint-estate in them all, but they all four take jointly for life, and each husband and his wife have a several inheritance in a moiety.

Plow. 35 a; Co. Lit. 183.

But, if land be given to a man and a woman unmarried, and the heirs of their bodies, this is a tail special, for the possibility that they may marry, and then the descendants of that marriage only can inherit. So, if the gift be made to a man that hath a wife, and to a woman that hath a husband, and the heirs of their bodies, this is a tail special presently in them, for the possibility that they may marry; and the descendants of such marriage may inherit according to the limitation of the gift.

Co. Lit. 25 b; Bro. *Estate*, 22; *Tail*, 16.

If an estate be limited to husband and wife, and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life, because they shall not be (*a*) presumed to intermarry after they are once legally divorced by church censures.

3 H. 6, 48. (*a*) So, if lands be given to a man and his mother, and the heirs of their bodies begotten, they have but a joint-estate for life; but in this case, the mother and son have several inheritances. Co. Lit. 184 a.

And in all the cases above-mentioned where the inheritances are several, the reversion depending thereon is several also; and if any of the donees die without issue, the donor shall, after the death of all the donees, enter into a moiety, or a third part, &c.

Co. Lit. 183 b.

If lands be given to two men, and the heirs of their bodies begotten, remainder to them two and their heirs, they are joint-tenants for life, tenants in common of the estate-tail, and joint-tenants of the fee.

Co. Lit. 183, 184.

[If lands be given to two men *and the survivor of them, and their heirs, equally to be divided between them share and share* alike; they are joint-tenants for life with several inheritances.

Barker v. Giles, 2 P. Wms. 280; 9 Mod. 157; 3 Br. P. C. 297, S. C. ‖ This case, says Sir J. Mansfield, in Garland v. Thomas, 1 N. R. 91, turned on the meaning of the word "survivor," to which Lord Chancellor King could not give effect, without making it a joint-tenancy.‖

If an estate be given to two and the survivor of them, and the heirs of the survivor, they are not joint-tenants in fee, but have only an estate of freehold during their lives, with a contingent remainder in fee to the survivor.

Vick v. Edwards, 3 P. Wms. 372. See Fearne's Contingent Remainders, 4th ed. 522; Co. Lit. 13th ed. 191, note 1.

But, where there was a devise to three persons, to have and to hold to them as *joint-tenants*, and the survivors and survivor of them *and the heirs and assigns of such survivor for ever* it was holden to be a joint-tenancy in fee.

Goodtitle v. Layman, K. B. Tr. 12 G. 3, *ubi supra*.]

(H) Of the joint and distinct Interests of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

1. *In what Acts they must all join.*

If a feoffment be made to two or more jointly, they shall all do hom-

age and fealty; but, if a feoffment be made by them, homage and fealty done to any one of them is sufficient.

Co. Lit. 67 b.

Joint-tenants or tenants in common of an advowson are regularly to join in presentation; and therefore if one joint-tenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unless they join in presentation, and after the six months, he may, in that case, present by lapse.

Co. Lit. 186 b. Where joint-tenants of an advowson made partition by deed of covenant to present by turns, and held good. Carth. 505; Ld. Raym. 535; 12 Mod. 321; Salk. 43, pl. 1.

If one tenant in common of an advowson present alone, this doth not put the other out of possession, for at the next avoidance they may join in presentment.

2 Roll. Abr. 372; And. 63.

Or if there be two joint-tenants seised of an advowson, and the one present without the other, this is no (*a*) usurpation upon his companion, but he may allege this presentment in a *quare impedit* as a title for himself to the next avoidance, and this by reason of the privity there is betwixt them.

27 H. 8, 11 b; Co. Lit. 186 b. (*a*) So, if there be two joint-tenants, and the one present the other, this doth not gain any possession; for that it is not strictly and properly a presentation, but rather a prayer to be admitted. 14 H. 8, 2 b. *β* A deed made by a joint-tenant, in common or coparcener, purporting to convey in severalty is not void, but conveys the whole interest of the grantor in the premises purporting to be conveyed. Lessee of White v. Sayre, 2 Ohio, 113. See Varnum v. Abbott, 12 Mass. 474; Bartlet v. Harlow, 12 Mass. 348.*g*

[But in the case of coparceners the law is different. For upon their not agreeing to present, the law considers their right of presenting as severed by a partition to present by turns, as much as if they had actually made such a composition: therefore though tenants in common must join in a *quare impedit*, coparceners need not. If they cannot agree, it is of common right that the eldest shall present on the first avoidance; the second on the second, the third on the third, and so on. This privilege goes to the issue or assignee in law, or in fact, such as the grantee, (*b*) or tenant by the curtesy.

1 H. Bl. 417; 5 H. 7, 8, pl. 17; 2 Roll. Abr. 346, pl. 1, 2, 3; Co. Lit. 166 b; Moore, 225. (*b*) It hath been questioned, whether it goes to the grantee. See Hargr. Co. Lit. 166 b, n. 2. The affirmative, however, is maintained by a great living authority. See 1 H. Bl. 412.

If two tenants in common be sued in a *quare impedit*, one make default, and the other appear, if he have judgment, he shall have a writ to the bishop, though on default the plaintiff is entitled to a writ to the bishop against him who made default. And where one suffers judgment by default, and the other dies pending the writ, this judgment will be a bar to another *quare impedit* brought by the one who suffered judgment by default and the representative of the other (in which the former is summoned and severed) to recover the *same* presentation; though it is no bar to the right of such representative to recover on the next avoidance *in his* term, where they have agreed to present by turns.

2 Inst. 124; 2 Roll. Abr. *Present.* 372, pl. 112, 373, pl. 12; Barker v. Bishop of London, 1 H. Bl. 412.

If a lapse incurs, where persons have a right to present by turns, it is holden, that the right only of the person who had then a right to present, shall be lost.

Bro. *Present.* pl. 26.

So, if there are four coparceners, the eldest and second present, a stranger usurps on the third; this usurpation will only affect that turn, and the fourth may present when his turn comes, and, if disturbed, may have a *quare impedit*, for the usurpation only disturbed the turn of the third.

Bro. *Qua. Imp.* pl. 118.

A *quare impedit* was brought against the Bishop of Bath and Wells, and Theophilus Lindsey, clerk, for the vicarage of Chew Magna with the chapel of Dundrey annexed, in Somersetshire. The declaration stated that the advowson belonged to one Richard Roberts in the time of Queen Elizabeth, upon whose death it descended to his four daughters in coparcenary. It then stated the several alternate presentations by them or their assignees, till the seventh avoidance thereof, after the death of the said Richard Roberts, by the death of John Hatch, clerk. It then stated, that upon that avoidance one Silvanus Bond, claiming title under Prudence Amory, one of the daughters of the said Richard Roberts, presented William Smith his clerk, who was thereupon admitted. It then stated the presentation of one Robert Pyke on the death of Smith, and the death of Pyke, which made the present avoidance, and the plaintiff, claiming title under Mary Westcot, the eldest daughter of Richard Roberts, said, that it belonged to her now to present in this the ninth avoidance after the death of the said Richard Roberts, and that the defendants disturbed her.

Pyke, widow, executrix, v. Bishop of Bath and Wells, and Lindsey, clerk, C. R. Hil. 27 G. 3.

To this the bishop pleaded, that he claimed only as ordinary, &c.

The defendant Lindsey in his plea admitted the whole of the declaration down to the seventh avoidance by the death of Hatch, but derived a title under Prudence Amory to one Thomas Gibbon, who upon that avoidance presented one Robert Rogers his clerk, who was thereupon admitted, &c., and that the said Robert Rogers died incumbent thereof; that his death made the eighth avoidance after the death of the said Richard Roberts. It then stated that Bond afterwards, upon the death of Rogers, usurping on the right of one Elizabeth Pyke, who claimed under the fourth daughter of Richard Roberts, presented Smith; it stated also the death of Smith, and presentation and death of Pyke, and that it now belongs to the defendant claiming title under Elizabeth Squire, the second daughter of Richard Roberts, to present a clerk on this avoidance, being the tenth avoidance since the death of the said Richard Roberts.

The plaintiff in his replication, after stating the title of Silvanus Bond to present upon the seventh avoidance by the death of Hatch, said that Thomas Gibbon, attempting to usurp upon the said Silvanus Bond, obstructed him in his presentation, and brought a *quare impedit* against him and the then Bishop of Bath and Wells. He then stated the whole proceedings on that *quare impedit*, and that judgment was given for the said Silvanus Bond, and a writ awarded to the bishop to admit his clerk. It then stated the several continuances of the writs to the bishop for near two years, when Smith was admitted at the presentation of Bond in pursuance of that recovery. The plaintiff then said, that pending this *quare impedit* between Gibbon and Bond, the bishop, at the instance and presentation of Gibbon, admitted the said Robert Rogers, which admission, &c., being made pending the said writ by virtue of the said judgment, became wholly void in law; but that before the said Silvanus could obtain the admission of his clerk, the said Robert Rogers, died so encumbering the said vicarage, &c.

The defendant in his rejoinder, after protesting against the title of the said Silvanus, and protesting that the said Robert Rogers did not die before the said Silvanus could have obtained the admission, &c., of his clerk, said, that the said Robert Rogers lived a year, three months, and ten days after the giving of the said judgment, and was during all that time incumbent of the said vicarage; and that the said Silvanus did not at any time during his lifetime deliver any writ to the bishop to admit his clerk, but neglected to do it till after the death of the said Robert Rogers, and suffered him to continue incumbent till the time of his death.

To this there was a general demurrer, and joinder in demurrer.

Lawrence, Serjeant, for the plaintiff. The question in this case is, Whether the institution and induction of Rogers pending the *quare impedit* brought by Gibbon against Silvanus Bond be not wholly void? Whether the institution and induction of a clerk at that time can be considered as a plenarty? The effect of this institution and induction being to defeat the object of the suit, it is fraudulent, and therefore void. For any act done by fraud to defeat the law is void. In Dyer, 295 b, p. 16, it was held, that if the ancestor a few days before his death, with intent to discharge the heir of assets, enfeoff him of the same land by fraud, the heir shall not take advantage of this fraud. In 3 Co. 78 b, a presentation obtained by collusion is void. Co. Litt. 102 a, b. If an action of debt be brought against the heir, and he alien, hanging the writ, yet shall the land which he had at the time of the original purchase be charged; for that the action was brought against the heir in respect of the land. Again, in Co. Litt. 344 b. At the common law, if hanging the *quare impedit* against the ordinary for refusing of his clerk, and before the church was full, the patron brought a *quare impedit* against the bishop, and hanging the suit, the bishop admit and institute a clerk at the presentation of another, in this case, if judgment be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent that came in *pendente lite* by usurpation, for *pendente lite nihil innovetur*.

In the case of Elvis, knight, v. Archbishop of York and others, in Hob. 320, Lord Hobart says, "I hold it clear that the bishop cannot refuse to admit the clerk of the party that recovers, and return a plenarty upon another's presentation and right:" and again, "It is clear that the clerk that came in hanging the suit, by the presentation of them that have no right, shall be removed." In 3 Leon. 138, Moore v. Bishop of Norwich, Lord Anderson has these words, "What person soever is presented and admitted after the action brought, and unless it be that the title of the patron be paramount the title of the plaintiff upon such recovery, he shall be removed."

In Hob. 193, Winchcombe v. Pulleston, the defendant in a *quare impedit* pleaded that the plaintiff had filled the church hanging the writ, whereupon the plaintiff demurred, which confessed as much, and yet judgment was given for a writ to the bishop; and F. N. B. 35 c, agrees that a presentment hanging the writ shall not abate the writ; and 7 H. 4, 34 and 36. This shows that there is no plenarty in contemplation of law by a presentation and institution during the suit, for if there were, this writ to the bishop *ad admittendum clericum* would be totally useless. All these cases are where the judgment was in favour of the plaintiff; but that makes no difference, for in *quare impedit* both plaintiff and defendant are actors. Booth, 121, 230. Besides, in F. N. B. 35 c, it is laid down, that if the plaintiff's clerk be instituted and inducted pendent the writ, it shall not abate the plaintiff's writ; but in that case, if the defendant recover against the plaintiff, he

shall avoid the plaintiff's clerk; and so, if the defendant's clerk be admitted pendent the writ against him, if the plaintiff recover, he shall avoid the defendant's clerk.

There can be no doubt then from these cases, but that the admission of Rogers pending the suit, was merely void, and that during his lifetime Bond might have removed him. The question, then, arises, Whether Bond's suffering him to continue incumbent till his death will make any difference? whether it makes that a plenarty which would otherwise have been wholly void? It certainly does not; for no length of time can give effect and validity to a void act. *Quod ab initio non valet, tractu temporis non convalescit.* The moment the judgment was given, Rogers was as to Bond amoved. In 2 Roll. Abr. 350, pl. 6, if a man recover in a *quare impedit* against the incumbent, the incumbent is so removed by the judgment, that the recoveror may present to the church without any other amoval of the incumbent, though the incumbent continue incumbent *de facto* until the presentment by the recoveror. And in pl. 7. But after such recovery in a *quare impedit*, a stranger to the recovery cannot present to the church; for, notwithstanding the recovery, still the incumbent continues incumbent *de facto* as to strangers. This last authority shows the distinction between the effect of the recovery on the parties to the suit, and on strangers; that as to the one, there is a plenarty; as to the other, the church is merely void. In the first case, in Rolle, it may be said that the *quare impedit* was against the incumbent himself, but that in this case it was not, but only against the patron: but by analogy the rule will hold in either case, for at the time the suit was instituted the church was void, Rogers was not presented; he could not be made a party to the suit. It would be absurd to say that the judgment can remove parties to the suit, but not those introduced pending the suit. If, then, the effect of a judgment on a stranger admitted pending the suit, be the same as on the incumbent himself where he is a party to the suit, so as to remove him from the time of the judgment being given, I conceive it can make no difference that the writ was not sued out earlier. For I know of no limitation in law for suing out a writ *ad admittendum clericum.* In F. N. B. 38 f. If a man do recover an advowson, and the six months pass, yet, if the church be void, the patron may pray a writ unto the bishop, and shall have it; and if the church be void when the writ cometh to the bishop, the bishop is bound to admit his clerk. And in reason the same law is, if the patron after the six months present unto the bishop, if the church be then void, the bishop is bound to admit his clerk. This shows that there is no time of limitation for suing out the writ, but that it may be sued out at any time whilst the church is void. If so, the death of the party can make no difference. In Hob. 166, Winchcombe v. Pulleston, the same thing may be void as to one person and not as to another, &c. Again, "this presentation, &c., made upon simony, is utterly void against the king, and the church in no sort filled by it: which being so, it is repugnant in itself to say, That it should be both void and not void at once against the king. Now it is confessed that it is utterly void against the king during the life of Say, so that the king might present as to a void church, which being granted, it is absurd to say that his death should alter the case; for the king cannot be dispossessed or barred but by an act, and the death is a privation but no act." This authority clearly shows, that if the church were void as to Bond, the death of Rogers could make no difference. It is clear, then, that

Bond was entitled to a writ to the bishop to admit his clerk; if, therefore, the court should give judgment in favour of the present defendant, they must decide that a clerk coming in under a writ of *admittendum clericum* is an usurper; and such a decision would be arraigning the justice of the former judgment.

Hill, Serjeant, for the defendant. The question in this case is, Whether the presentation now in question be the ninth or tenth turn of the person claiming under the last common ancestor who was seised of the entirety? The declaration states it to be only the ninth turn, and omits for that purpose the presentation of Rogers. The defendant in his plea has introduced this presentation. The replication states that this presentation was made by one Gibbon, pending a suit in a *quare impedit* brought by Gibbon against one S. Bond, wherein there was a judgment for Bond; but that before Bond's clerk could be admitted, Rogers died incumbent. The rejoinder admits this judgment, states the particular time of the death of Rogers, which was long after the judgment recovered; and that Bond sued out no writ in the lifetime of Rogers to remove him. I admit that the presentation of Gibbon's clerk pending the suit was covinous, and that he might have been removed by Bond. But Bond's conduct in not removing him was fraudulent; for if he who was first defrauded sits by, and suffers that fraud to continue, when he might have prevented it, to the prejudice of a third person, he is himself guilty of fraud. And where an advowson descends to coparceners, the law is exceedingly precise in obliging them to due diligence, so as they may not by any laches on their parts affect the rights of those who are to come in succession after them. All the cases which have been cited on the other side prove, that Rogers was incumbent as to all but parties to the suit. If he had sued his parishioners for tithes, they could not have pleaded this judgment in bar to that action: they could not have impeached his title on that ground to recover as against them. He was in full perception of the profits, and enjoyed all the benefits of the church. Wats. Co. In. ed. folio 414; octavo 749. As to Bond, the church was so vacant by this judgment that he might have presented his clerk. The plaintiff has in some manner affirmed that a writ was delivered to the bishop for that purpose. This fact, if true, would have been some excuse; but it is false; here is, in fact, no averment of delivery; the plaintiff only says, "although he informed the court he had delivered it." The bishop is the officer of the court, and if he had been properly served with it, there can be no doubt but he would have executed it. If he had not, this court would have compelled him to have done it. In F. N. B. 38 c, it is said, that the party recovering shall have an *alias* and a *pluries*, if the bishop do not execute the writ, and attachment against the bishop, if need be. So, in the case of Moore v. Bishop of Norwich, cited from 3 Leon., the bishop was fined 10*l.* for not executing the writ, and a *sicut alias* under a penalty of 100*l.* was awarded. Or he might have had a writ of *quare non admisit*, as in F. N. B. 47 c. If a man do recover an advowson, and hath a writ unto the bishop to admit his clerk, and he will not admit him, then the party may sue an *alias* and a *pluries*, or attachment, &c., or may sue a writ out of the Chancery, or out of the Common Pleas at his election, *de quare non admisit*, &c. This fine on the bishop for a contempt of the court in not obeying the writ was introduced by 25 Ed. 3, c. 6, which directs that the temporalities shall not as before be seized into the king's hands for a contempt, but that the

court shall take a reasonable fine. Why did not Bond then, armed with this process, deliver this writ to the bishop, or compel him to execute it? Or Bond might have had a *quare incumbravit*, for though a *ne admittas* was not sued out to the bishop, that was unnecessary, the bishop being a party to the suit. (*a*) I admit, that there is no difference between the plaintiff and defendant in a *quare impedit*, where the defendant makes title.—But it is manifest, that there would be the greatest injustice done to the other parties in coparcenary, if a party who had recovered in a judgment were to lie by, and not take advantage of such recovery till the living became void; he would by this means get two turns. Now this very thing is confessed on this record, and not the slightest excuse offered for it. Though I may not be able to produce a case directly in point, yet there are many that apply upon principle. If an incumbent be deprived or resign to the ordinary, it is the duty of the ordinary to give notice to the patron, otherwise there can be no lapse; or if he collates or institutes on the presentation of a false patron, the true patron may present. But, if the true patron do not present, and the collatee or presentee die incumbent, the true patron, if he have only an alternate right of presentation, has lost his turn. This was determined in the case of Leak v. Bishop of Coventry, and another, in Cro. Eliz. 811. In that case there was an alternate presentation to two persons, and the clerk of the one patron had been deprived—the bishop, without giving notice of that deprivation to the other, collated his clerk, which collatee died incumbent. The court said that this collation by the bishop is good against all but the very patron, and this only through defect of notice, so as he might have removed the incumbent by a *quare impedit*. But where he doth not remove him, so as he dies incumbent, this is a serving of his turn, and as a presentment in his turn, so as that the other patron shall not be now prejudiced by his negligence, but shall have it now as in his turn. And it is a plenarty and incumbency as against him, so as he now may present, and well say, that the turn of the other was served. These cases show the great attention the law requires where the patron has only a turn, and the care it takes that the interest of another patron shall not be affected by his negligence. Suppose the church had been totally void, and Bond had sat still, and suffered a lapse to the bishop, and the bishop had presented, that would have satisfied his turn. And as in that case the other parceners could not interfere to prevent the lapse to the bishop, so in this case there was no possible way for them to make Bond take any steps to remove Rogers. Here Rogers lived a considerable time after the judgment was recovered; but supposing he had lived a much shorter time, still if he had not been removed, Bond's turn would have been satisfied. In the great *commendam* case of the King and Queen v. Bishop of London and others, in 4 Mod. 212, and 1 Lord Raym. 26, it was held that if the incumbent die during the continuance of the dispensation, the king will lose his title to present. This being determined against the crown, holds *à fortiori* against a subject.

(*a*) Bro. Ab. *Qu. Incumb.* p. 3.

The present case is grounded on wilful laches, which is not denied by the plaintiff himself. Had the dispute been only between Gibbon and Bond, and Bond had, after the recovery, permitted Gibbon's clerk to continue incumbent, his acquiescence would have prejudiced no one. But where other persons have an interest, his acquiescence shall not be allowed

to prejudice their rights. For in law and in equity, where there is an alienation, of which a party may take advantage, and neglects to do it, and such neglect works prejudice to a third person, there the rule of *pendente lite nihil innovetur* does not hold.

There is a great difference where the vacancy is caused by the death of the incumbent, and where it is caused by his resignation. It was held in the case of the Queen v. Bishop of Lincoln and Ligh, Cro. Eliz. 119, that by an avoidance by resignation or deprivation, the queen should not lose her presentment; but if the incumbent had died, it were otherwise. And so in Golds. 66, 86. The reason is, that an avoidance made by resignation may be covinous, and therefore shall not pass for a turn; but that in case of death, for there can be no ground presuming covin.

Lord Loughborough, after stating the pleadings and the arguments that had been used by the counsel on each side, said—It is material upon these pleadings to inquire at what time Smith was presented by Bond. Neither the replication nor the rejoinder have stated any given time when the presentation was made. But the plea has stated expressly that Rogers died incumbent, and that Smith was not presented by Bond till after the death of Rogers in the eighth turn, after the death of Richard Roberts. That presentation must therefore have been an usurpation upon the right of the person then entitled to present; and as the replication has neither avoided nor denied this fact in the plea, of course it stands admitted. There must therefore be judgment for the defendant.

Joint-tenants and tenants in common may, according to the interests they have, join or sever in making leases, and such leases shall bind, whether made to commence *in præsenti* or *futuro*.

Co. Lit. 186; Bro. tit. *Grants*, 154; Roll. Abr. 848. *β* In Massachusetts, a tenant in common may make a valid parol lease of a specific portion of the land for a year. Rising v. Stannard, 17 Mass. 282.*g* ‖ But, though joint-tenants join in the demise, yet, as each hath for this purpose a right to, and each demises only, his own share, consequently, each can put an end to the demise, as to his own share, whether his companion join with him or not; and may, giving notice to quit, recover such share in ejectment, on his several demise. Doe v. Chaplin, 3 Taunt. 120; Co. Lit. 186 a. See the cases referred to, *supra*, tit. *Ejectment*, vol. iii. p. 285, to which add Doe v. Grant, 12 East, 221.‖

But, if there be two joint-tenants, and they make a lease by parol or deed poll, reserving rent to one only, yet it shall enure to both; but, if the lease had been by deed indented, the reservation should have been good to him only to whom it was made, and the other should have taken nothing. The reason of the difference is this: Where the lease is by deed poll or parol, the rent shall follow the reversion, which is jointly in both lessors; and the rather, because the rent being something in retribution for the land given, the joint-tenant to whom it is reserved ought to be seised of it in the same manner he was of the land demised, which was equally for the benefit of his companion as himself; but, where the lease is by deed indented, they are estopped to claim the rent in any other manner than is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from, or vary his own solemn act.

2 Roll. Abr. 447; Co. Lit. 47, 186, 214; Vent. 161, 162, 163; Dy. 263 a.

If two tenants in common of lands join in a lease for years by indenture of their several lands, this shall be the lease of each for their respective parts, and the cross-confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively, and that excludes the necessity of an estoppel, which is never

admitted if by any construction it can be avoided, as being one of those things which the law looks upon as odious, because it chokes and disguises the truth.

Roll. Abr. 877.

β It seems that one joint-tenant, or tenant in common, cannot erect buildings or make improvements on the common property, without the consent of his co-tenant, so as to throw upon him any proportion of the expense.

Crest v. Jack, 3 Watts, 238.

When two tenants in common sell their lands, they must unite in any suit for a specific execution.

Bodley v. Ross, 3 A. K. Marsh. 622.*g*

2. *Where the Acts of one will be equally advantageous as if done by both.*

If there be two joint-tenants who hold by knight's service, and one of them perform the service by going with the king to war, &c., this shall suffice for both; for though they be two tenants, yet they hold only by one tenure.

Co. Lit. 70 b; 2 Inst. 34.

If there be two joint-tenants of land holden by heriot-service, and one die, the other shall not pay heriot-service; for there is no change of tenant, the survivor continuing tenant of the whole land.

Owen, 152, Butler v. Archer.

It hath been holden, that the possession of one joint-tenant is the possession of the other, so far as to (*a*) prevent the statute of limitations.

Ford v. Lord Grey, Salk. 285; 6 Mod. 44, S. C. β The possession of one tenant in common is the possession of all. Hitchcock v. Skinner, 1 Hoff. 21.*g* [So, in the case of tenants in common. In order that the statute of limitations may run, there must be an adverse possession; a disseisin, and a disseisin strictly proved: the bare taking of the profits by the one is not an actual disseisin, ‖ nor is the levying of a fine of the whole by the one of itself an ouster of the other.‖ Reading v. Rawsterne, 2 Ld. Raym. 830; Fairclaim v. Shackleton, 5 Burr. 2604. But the perception of the rent and profits, though not of itself an actual ouster, may be evidence of an ouster; and therefore Lord Hardwicke said, that a fine and non-claim by one tenant in common will bar his companion, if he do not call the person levying it to an account of the profits. Story v. Lord Windsor, 2 Atk. 632; Earl of Sussex v. Temple, 1 Ld. Raym. 312. And in the case of Doe v. Prosser, Cowp. 217, it was adjudged, that an uninterrupted possession for thirty-six years by one tenant in common of the rents and profits without any account to, demand made, or claim set up by, his companion, was sufficient ground for a jury to presume an actual ouster of such companion; and it was said, that in the above case of Fairclaim v. Shackleton, a possession of twenty-six years by receipt of rents and profits, was holden not to be an actual ouster of the co-tenant, because it was a fact which the jury had not found, which it had not been left to them to presume, and which, therefore, the court could not presume. ‖ But the levying of a fine of the whole by one tenant in common, and perception of the rents and profits afterwards by him for nearly five years without account, was not considered as evidence from which the jury should be directed, particularly against the justice of the case, to find an ouster of his companion at the time of the fine levied, so as to make an actual entry necessary to enable the latter to maintain an ejectment. Peaceable v. Read, 1 East, 568.‖ (*a*) So, if two joint-tenants be disseised, and one enter, this is in law the entry of both, and so it shall be pleaded. Bridgm. 129. ‖ But, if on the descent of an estate to parceners, one of them is under a disability, which continues more than twenty years, and the other does not enter within that time, the disability of the one does not preserve the title of the other after the twenty years elapsed. Roe v. Rowlston, 2 Taunt. 441.‖

‖ So, the possession of one parcener is the possession of the other so as to create a seisin in the other, and carry her share by descent to her heirs.

Doe v. Keen, 7 T. R. 386. See also Doe v. Pearson, 6 East, 173.

If a man devise certain annuities to his four sons out of certain lands, and devise over, that if his heir do not pay these annuities, the sons shall have the land; if the annuities be not paid, and one of the sons enter generally, this shall be an entry for all the four sons, they being joint-tenants.

1 Roll. Abr. 740, p. 7.‖

Also, if two joint-tenants be of an advowson, and the one present to the church, and his clerk be admitted and instituted, this in respect of the privity shall not put the other out of possession, but that if that joint-tenant who presenteth dieth, it shall serve for a title in a *quare impedit* brought by the survivor.

Co. Lit. 186 b.

If there be two joint-tenants by disseisin, abatement, or intrusion, and the disseisee or owner of the land release to one of them, this shall enure only for the benefit of him to whom the release was made, who being seised *per mie et per tout* is capable of such a release, and by the delivery of the release the whole freehold and inheritance by operation of law vesting in him, the interest of his companion, being by wrong, is immediately devested and vanished.

Lit. § 306; Co. Lit. 194 a.

But, if two men usurp by a wrongful presentation to a church, and their clerk is admitted, instituted, and inducted, and the rightful patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in merely by wrong, but their clerk is in by admission and institution, which are judicial acts.

Co. Lit. 194.

So, if a man be disseised, and the disseisor make a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shall enure to both the feoffees, because they come in by title and purchase, and not by wrong, and are presumed to have a warranty annexed to their estate, which is greatly favoured in law.

Lit. § 207; Co. Lit. 194 b.

If a feoffment be made to A and B by deed, and livery be made to A in the absence of B in the name of both, the livery is good to pass the estate to both; but, if the feoffment had been without deed, and the livery given to one in name of both, it should operate to him only; because the parties are united in a deed, they all take as one; therefore livery to one in the name of the rest, is an actual delivery to them all; but without deed they are not so united; and therefore the delivery to one in the name of several, is no actual delivery to the rest, but the whole estate must reside in him to whom it is delivered, and a subsequent assent cannot take it out of him, such assent being not so solemn as the feoffment. Besides, in the case of the feoffment by deed A may be looked upon as the attorney of B to receive livery, and therefore the estate shall immediately vest in B because every man is presumed to assent to a grant for his advantage; but the feoffment without deed will admit of no such construction, because no man can receive livery as attorney to another without an appointment by deed.

Co. Lit. 40 b, 359; 2 Vent. 202, 205; 5 Co. 95 a; 2 Roll. Abr. 9; 2 Leon. 23, Mutton's case.

So, if a feoffment be made to A and B, and the feoffor give a letter of attorney to deliver seisin, and the attorney give livery to A in the absence

of B in the name of both, this is a good livery; for though the entire possession be delivered to one only, yet they being joint-tenants by the deed of feoffment, such livery to one makes no alteration or change of the possession, because if the livery had been made to both, each had been placed in the possession.

Co. Lit. 49; 2 Roll. Abr. 8.

So, if a lease for years is granted to A and B, the remainder to C in fee, and livery is made to A in the absence of B, whether the conveyance be by deed or without, the livery is good, and vests the remainder in C, because by the bare demise A and B have an interest; each being equally entitled to the whole possession, either may invest himself in the whole possession by entry, or receive the possession from the lessor by the solemnity of livery; and therefore when the whole possession is delivered by the lessor, and livery is made to A in the absence of B in the name of both, this livery is sufficient to vest the remainder in C, because A had as much power to receive the possession of the whole, as if the lease for years had been made to him only, he and B being joint-tenants by the demise, and thereby seised *per mie et per tout.*

Co. Lit. 49; 5 Co. 94; 2 Roll. Abr. 8.

If a surrender be made of a copyhold estate to A and B and their heirs, and A come in within the time of the proclamations, but B do not, whether A shall have the whole, or a moiety shall be forfeited, *dubitatur.*

Yelv. 1, and vide tit. *Copyhold.*

β In Connecticut, one tenant in common, though he declare on his own seisin and possession, without noticing the rights of his fellow-commoners, may maintain ejectment against a mere disseisor.

Smith v. Starkweather, 5 Day, 207. See Clark v. Vaughan, 3 Conn. 191. But in New York, tenants in common must join in an action of trespass *quare clausum fregit.* Austin v. Hall, 13 Johns. 286.

A purchase of an adverse claim by one joint-tenant in possession does enure to the benefit of all the co-tenants, but this rule does not apply to a purchase made before the joint-tenancy commenced.

Sneed's heirs v. Atherton, 6 Dana, 278.

When one of several joint-tenants or coparceners buys in an encumbrance on the joint-estate, the purchase will enure to the benefit of his co-tenants, if they elect to participate in the purchase, upon condition of their paying their due proportions of its actual cost.

Lee and Graham v. Fox, 6 Dana, 176.

One tenant in common may purchase the interest of his co-tenant, in favour of a third person or of himself, against the other, for the sole debt of the latter, or under an execution in favour of a stranger against both.

Baird v. Baird's heirs, 1 Dev. & Bat. 524.*g*

‖ One joint-tenant, may without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint-tenants. *Quære*, if the others *dissent?*

Robinson v. Hoffman, 4 Bing. R. 562; and see Leigh v. Shepherd, 2 Bro. & B. 465.‖

3. *Where the Acts of one will bind the other, whether to his Advantage or Prejudice.*

Herein we must observe, that regularly every act done by one joint-tenant for the benefit of him and his companion shall bind the other; but no injurious act of one joint-tenant alone shall prejudice his companion.

Bridgm. 129; 2 Co. 67. ‖ Rudde v. Tucker, Cr. El. 803. Where a lease for twenty-

one years contained a proviso, that in case either of the parties or their *respective* heirs or executors wished to put an end to the term at the expiration of the first seven or fourteen years, six months' notice in writing should be given *under his or their respective* hands; it was holden, that a notice to quit signed by *two* only of *three* executors of the original lessor, to whom he had bequeathed the freehold as joint-tenants in fee, expressing it to be given *on behalf of themselves and the third executor*, was not good within the terms of the proviso. The court held further, that this notice could not be supported upon the general rule of law, that one joint-tenant may bind his companion by an act done *for his benefit;* for that it does not appear that the determination of the lease was for the benefit of the co-tenant, the proof of which lies upon the party who would avail himself of it. They held further, that the notice being such as the tenant was to act upon at the time, no subsequent recognition of it by the third executor can make it good by relation; and that his joining in the ejectment was no evidence of his original assent to bind the tenant by the notice. Right v. Cuthell, 5 East, 491.‖

Therefore, if there be two joint-tenants of a seignory, and one disseise the tenant, this shall suspend but a moiety of the seignory; for his companion shall not be prejudiced by his injurious act, to which he was no party, and therefore after such disseisin the disseisor is liable to the distress of his companion for his moiety of the seignory.

Co. Lit. 148 b; 9 Co. 135 b.

If there be two joint-tenants, and one of them levy a fine, this does not bar his companion, unless he omit to make his claim within five years after his title accrued.

2 Inst. 516. ‖ The levying of a fine of the whole by one joint-tenant is not of itself without an adverse claim set up at the time it was levied an ouster of the other. Vide *supra.*‖ *β* A joint-tenant who has ejected his co-tenant, may maintain ejectment. Lessee of White v. Sayre, 2 Ohio, 110.*g*

If there be two tenants in common of an advowson, and they bring a *quare impedit*, and the one release, yet the other shall sue for and recover the whole presentment.

Co. Lit. 197 b.

If two joint-tenants make a feoffment on condition that if they pay such a sum before a certain day they may re-enter, and before the day one of them release this condition to the feoffee, this shall not bind his companion.

Dals. 44, pl. 33.

If two tenants in common be of the wardship of the body, and a stranger ravish the ward, and the one tenant in common release to the ravisher, this shall go in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any bar to him.

Co. Lit. 197 b.

But, if two joint-tenants be of a ward, and the one disparage the heir, both shall lose the wardship; for the words of the statute are, *et omne commodum*, &c.

Co. Lit. 80 b; Bridgm. 129.

Two joint-tenants for years, or for life, one of them doth waste, this is the waste of them both as to the place wasted; yet the words of the statute of Gloucester are, *home que tient;* but treble damages shall be recovered against him who did the waste only.

2 Inst. 302.

If there be two or more joint-tenants of land whereof a woman is dowable, and one of them assign her dower thereout, this is good, and shall bind the others, because they were compellable to assign it in such manner. But, if

one of them had assigned her a rent thereout, in lieu of dower, this would not bind the rest, because they could not have been compelled to it by suit.

Co. Lit. 25 a; 2 Co. 67; Perk. 397

β Where two non-residents held in common an unsettled tract of land, which without their knowledge was sold for the non-payment of state taxes, and they afterwards made a partition by mutual deeds of release and quit claim; after which one of them, within the time of redemption, paid the tax to the purchaser at sheriff's sale, from whom he took a deed of release and quit claim to himself alone, of the whole tract: held, that this payment and deed enure to the benefit of them both; that the party paying had his remedy by action against the other for contribution, and that he who had not paid, might still maintain a writ of entry against the other for his part of the land.

Williams v. Gray, 3 Greenl. 207.

When one tenant in common enters on the whole estate, and takes the profits of the whole, and claims the whole exclusively for twenty-one years, the jury ought to presume an actual ouster, though none be proved.

Frederick v. Gray, 10 S. & R. 182. *g*

(I) Of Severance and Survivorship: And herein,

1. *Of the Right of Survivorship, and what Things will survive.*

THE *jus accrescendi*, or right of survivorship, takes place only between joint-tenants; as, where lands are given to two men and their heirs, the survivor shall have the whole; for being limited to them and their heirs, the feoffor or donor hath thereby transferred the absolute property to them. But how the word *heirs* came to signify the heirs of one of them, so as to exclude the heirs of him who died first, is not easy to be determined, and can be accounted for no otherwise than that both joint-tenants being entitled to the whole during their respective lives, the survivor having continued longest in possession was therefore presumed to have done most service to the feud, and upon that account was allowed to transmit it to his heirs. Also, says my Lord Chief Justice Holt, the common law does not love to multiply tenures.

Co. Lit. 181. β The right of survivorship, except perhaps in estates held in trust, is abolished in Pennsylvania, New York, Virginia, Kentucky, Indiana, Missouri, Tennessee, North and South Carolina, Georgia and Alabama. In Connecticut and Ohio this estate is unknown. Griff. Reg. h. t.; Bouv. L. D. v. Estate in Joint-Tenancy. *g* Salk. 392.

So, if land be given to two men for life or years, they are joint-tenants, and the survivor shall hold the whole for his life, or according to the number of years limited in the conveyance.

Co. Lit. 181 b.

But, if a man let lands to A and B during the life of A, if B die, A shall have all by survivorship; but if A die, B shall have nothing.

Co. Lit. 181 b.

A naked trust or authority cannot survive; but a trust coupled with an interest shall survive together with it.

Co. Lit. 181 b. But for this vide head of *Trusts*.

If a lease be made to A and B for their lives, and the life of the longer liver of them, and they make partition, and then A die, the lessor shall enter into his part; for B has no title to it, because the right of survivorship was lost by the partition, which destroyed the joint-tenancy; nor

will the words *to the longer liver* be of any use to B, because they were void at first, being no more than the law implied in the joint-estate.

Co. Lit. 191 a; 2 Roll. Abr. 150.

Two joint-tenants of a rent-charge or rent-service, and one of them dies, the survivor shall recover all the arrearages which incurred and became due in the lifetime of his companion.

33 H. 6, 20 b; 15 E. 3, Assize, 18; 2 Roll. Abr. 86.

Two joint-tenants sow their land with corn, and one of them dies, the corn sown shall go to the survivor, and the moiety shall not be to the executors of the person deceased; for they are supposed to carry on the cultivation of the soil by (*a*) joint-stock.

Roll. Abr. 727. (*a*) So, if two joint-tenants sow their land, and one of them lets his moiety for years, and he who did not let dies, the other shall have the corn as survivor. Owen, 102.

But, if husband and wife are joint-tenants, and the husband sows the land with corn, and dies, the crop shall go to the executors of the husband, as it seems; for this land is not cultivated by a joint-stock, but it is totally the corn of the husband, and the property of it seems not to be lost by committing it to the joint-possession, any more than if it had been sown in the land of the wife only.

Roll. Abr. 727, and vide *supra*, letter (B), and the authorities there cited.

So, if there be two tenants in common, and one of them sow the land, and die, his executors shall have the corn; because they have different interests, and are supposed to cultivate by different stocks, and not by a joint one.

Perk. § 523.

2. *At what Time the Right of Survivorship is to take place.*

This right is to take place immediately upon the death of the joint-tenant, whether it be a natural or civil death; as, if there be two joint-tenants, and one of them enter into religion, the survivor shall have the whole.

Co. Lit. 181 b.

Also it is laid down as a rule, that there shall be no right of survivorship, unless the thing be in jointure at the instant of the death of him who first died; *nihil de re accrescit ei qui nihil in re quando jus accresceret habet.*

Co. Lit. 188 a.

Therefore, if there be two joint-tenants of a rent, and one of them disseise the tenant of the land, this is a severance of the jointure for a time; for the moiety of the rent is suspended by unity of possession, and therefore cannot stand in jointure with the other moiety in possession, so that if during such suspension one joint-tenant die, there can be no survivorship.

Co. Lit. 188 a, 148 b.

Two females joint-tenants of a lease for years, one of them taketh husband, and dieth, yet the term shall survive; for though all chattels real are given to the husband, if he survive, yet the survivorship between the joint-tenants is the elder title, and after the marriage the feme continued sole possessed; for if the husband dieth, the feme shall have it, and not the executors of the husband. But otherwise it is of personal goods.

Co. Lit. 185 b.

3. *What Disposition will work a Severance, and defeat the Right of Survivorship: And herein,*

1. What Disposition with a Stranger will work a Severance.

Although joint-tenants are seised *per mie et per tout*, yet to divers purposes each of them hath but a right to a moiety; as to enfeoff, give or demise, or to forfeit or lose by default in a *præcipe;* and therefore, where there are two or more joint-tenants, and they all join in a feoffment, each of them in judgment of law gives but his part.

Co. Lit. 186 a.

So, if there be two joint-tenants, and they both make a feoffment in fee, a gift in tail, or lease for life, &c., upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into (*a*) a moiety, because no more in judgment of law passed from him.

Co. Lit. 186 a. (*a*) But every joint-tenant may warrant the whole, because a man may warrant more than passeth from him. Co. Lit. 186 a.

If one joint-tenant bargains and sells his moiety, and dies before the deed is enrolled, yet the deed being afterwards enrolled, shall work a severance *ab initio*, and support by relation the interest of the bargainee.

Co. Lit. 186 a. *β* The conveyance of his share by a joint-tenant is a severance of the joint-tenancy. Robison v. Codman, 1 Sumn. 121.*g*

But, if one joint-tenant bargains and sells all the lands, and before enrolment the other dies, his part shall survive; for the freehold not being out of him, the jointure remains, and though afterwards the deed is enrolled, yet only a moiety shall pass; for the enrolment by relation cannot make the grant of any better effect than it would have been if it had taken effect immediately.

Cro. Ja. 53; Co. Lit. 186, 147 a, b; Buls. 3.

If a recovery be had against one joint-tenant, who dies before execution, the survivor shall not avoid his recovery, because that the right of the moiety is bound by it.

Co. Lit. 185.

If one joint-tenant agree to alien, and do not, but die, this will not sever the joint-tenancy, nor bind the survivor.

2 Vern. 63. That such an agreement does not bind at law. Co. Lit. 184 b, 185 a. || But in equity it may be enforced against the survivor, if the articles amount to an equitable severance of the jointure. See 2 Ves. 634.||

|| Articles of agreement by an infant, though made in consideration of marriage, will not operate as a severance of the joint-tenancy.

May v. Hook, Co. Lit. 246 a, n. 1; 1 Br. Ch. Rep. 112.||

Two joint-tenants of a church lease, one whereof being taken sick in a journey, to sever the jointure and provide for his wife sends for the schoolmaster of the town, (who was the only person he could get to come to him,) and acquainted him with his intentions, and desired him to prepare an instrument for that purpose; the schoolmaster drew a kind of deed of gift of the lease from the sick man to his wife, which he executed and died: and this being to the wife, and void in law, she would have made it good in equity, but was dismissed, being voluntary and without consideration.

Moyse v. Coles, Pr. Ch. 124; 2 Vern. 385, S. C.; Eq. Ca. Abr. 293, pl. 2, S. C. In the two last books the circumstances of this case are differently stated; though the result is the same.

|| If one of two joint legatees bring his bill for a moiety of the money, this will not sever the joint-tenancy. A demand, it seems, will not sever it.

But a note would do it, (*a*) because the joint-tenancy may be severed by any contract. And if they should say in an answer that they had agreed so to do, the court would construe them to have done a sufficient act to sever.

Perkins v. Bayntun, 1 Br. Ch. Rep. 118. (*a*) 2 Br. Ch. Rep. 224.‖

[A recital in a marriage settlement to which one only of two joint-tenants was party, that she should enjoy her moiety of personal estate to her separate use, and a covenant on the part of her husband that she should enjoy it quietly, &c., and that *for want of issue of her own body*, it should go to the next of kin of her own family, was holden by Lord Hardwicke not to sever the jointure; for where there is no agreement for that purpose, there must be an actual alienation to make it amount to a severance; and in this case there was nothing more than a declaration of one of the parties.

Patricke v. Powlett, 2 Atk. 54.]

β Where land was conveyed to A and B, their heirs and assigns, habendum "to the said A and B, their heirs and assigns, and to the heirs and assigns of the survivor of them for ever;" and afterwards A conveyed all his estate to trustees to pay debts, and a judgment being obtained against him, the premises were taken in execution, held, that the conveyance passed a joint-tenancy that the assignment operated as a severance, and that the execution had the same effect.

Davidson v. Heydon, 2 Yeates, 459.

A mortgage executed by two out of three joint-tenants, is a severance of the joint-tenancy.

Simpson v. Ammonds, 1 Binn. 175.*g*

2. What Disposition or Conveyance by one Joint-Tenant or Tenant in common, with his Companion, will work a Severance.

The proper conveyance by one joint-tenant to another, and what will most effectually sever the joint-tenancy, is a release. But one joint-tenant cannot enfeoff his companion, because they are both already seised (*b*) *per mie et per tout;* and this manner of conveyance passing by livery, cannot operate so as to give him what he already hath. But tenants in common cannot release to each other, for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which one cannot transfer to the other without the solemnity of livery.

22 H. 6, 42 b; Perk. § 193, 197; Co. Lit. 193 b, 200 b; 2 Roll. Abr. 86. (*b*) And therefore, if there be two joint-tenants, and one release to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee, which they jointly took, and are possessed of by force of the first conveyance. Co. Lit. 9, 200.

But, though a release be the proper conveyance from one joint-tenant to another; yet, if the jury find that the one joint-tenant did grant or convey to another, this amounts to a release; for they having found the substantial part, the court is to apply the words according to the operation they have in law; but every such conveyance must be pleaded as a *release*.

Chester v. Wilson, Vent. 78; Sid. 452, S. C.; 2 Saund. 96, S. C.; 2 Keb. 641, S. C.; Raym. 187, S. C.; 4 Mod. 151, S. P.; Fitzgib. 275.

So, if there be two joint-tenants for life, and one be a feme covert, and the baron and feme levy a fine to the other joint-tenant, and thereby grant *totum et quicquid* in the land for the life of the wife; upon the death of the other joint-tenant the lessor may enter; for the fine enured by way of release,

and then the other joint-tenant must have claimed the whole from the first feoffment; so could have had the whole but for his own life.

2 Roll. Abr. 86, 403; Cro. Ja. 698, Eustace v. Scawen; and vide 6 Co. 78 b, S. P.

An agreement between joint-tenants of an advowson, that they should be tenants in common, and that each of them should present alternately, [executed on both sides,] amounts to a severance and release.

Bp. of Salisbury v. Phillips, Carth. 505; Salk. 43, S. C.; Ld. Raym. 535, S. C.; 12 Mod. 321, S. C. || But before the statute of 5 Ann. c. 18, it could affect only the possession; it left the advowson still in jointure, and they must all have joined in a writ of right of advowson. Corbett's case, 1 Co. 87 a.||

|| An agreement by the husbands of two joint-tenants to make partition, and a partition actually made under such agreement, will not bind the inheritance of the wives.

Ireland v. Rittle, 1 Atk. 541. Vide Co. Lit. 171 a, n. 2.||

If there be two joint-tenants of a rent, the one may release to the other; but, if the rent be behind, the one cannot release his interest in the arrearages to another.

Leon. 167.

One joint-tenant or tenant in common may let his part for (*a*) years or at will to his companion; for this only gives him a right of taking the whole profits, when before he had but a right to the moiety thereof, and he may contract with his companion for that purpose, as well as he may with any stranger.

Co. Lit. 186 a; Owen, 102; Cro. Ja. 83; Moore, pl. 194. (*a*) If father and son be joint-tenants for 100 years, and the son take a lease from the father of lands for 15 years to begin, &c., the same shall conclude the son to claim the whole term or parcel of it by survivorship. 2 Leon. 159, said by Plowden, and agreed to by the court.

A partition or severance between joint-tenants of a (*b*) freehold must be by deed, because by the notoriety of investiture they take it jointly; and to alter that, a matter of solemnity is required, which is a deed. But tenants in common (*c*) may make a partition without deed; because that is only a setting out by metes and bounds, according to the first investiture, which gave each of them distinct moieties.

2 Roll. Abr. 255; Co. Lit. 169 a. *β* Partition *in pais* must be by deed. Black v. Tyler, 1 Pick. 150.*g* (*b*) But joint-tenants for years might make partition without deed before the statute 29 Car. 2, c. 3, of frauds and perjuries. Co. Lit. 187 a. *β* A deed is not requisite to make a partition between tenants in common, it may be done by parol, if done upon the land. Walker v. Bernard, Car. & N. 82. And a letter from A to B, in which A insures to secure to B's family, in any way B may desire, by his will, a moiety of a fund, in which A and B are interested as joint-tenants, is a severance of the joint-tenancy. Gould v. Kemp, 2 My. & Keen, 304. See as to the effect of verbal parol partition merely, Gratz v. Gratz, 4 Rawle, 411; Snively v. Luce, 1 Watts, 69; Higgs v. Stimmel, 3 Penns. 115; Hemmick v. High, 2 Watts, 159; Long v. Long, 1 Watts, 265;*g* || 47 E. 3, 22; 19 Ass. pl. 1, 30; Ass. pl. 8; Full. Penal. B. 2, 57. (*c*) But, not without writing executed by livery since the statute of frauds: indeed there can be no partition of land by parol. Johnson v. Wilson, Willes, 248; 7 Mod. 345, S. C.; Vin. Abr. tit. *Partition*, (D,) pl. 8, notes, S. C. ||

[If two joint-tenants enter into articles to make partition, and such articles amount in equity to a severance of the joint-tenancy, they will be enforced againt the survivor.

Hinton v. Hinton, 2 Ves. 634. || A covenant to sell, though it does not sever the joint-tenancy at law, will in equity. See 3 Ves. 276; 2 Br. Ch. Rep. 220; but see Pr. Ch. 121. A parol agreement for partition even by joint-tenants in fee, if in part executed and long acquiesced in, will be enforced in equity. Ireland v. Rittle, 1 Atk.

541. So, where two tenants in common, one of them an infant, and his guardian, joined in making partition by parol; and the infant, after attaining the age of twenty-one years, granted leases of the entirety of his allotment, and acquiesced for seventeen years, and afterwards filed a bill for partition; Lord Manners refused to decree one; for that the plaintiff by his own acts had ratified the partition already made; and that his acquiescence also for so great a length of time, during which the defendant's tenants had laid out large sums in improvements, on the faith of their title being in severalty, raised an equity, which would stop the court from interposing to disturb what had been done; and that the plaintiff therefore had no right to more than a conveyance in pursuance of the partition already made; which was ordered accordingly. Whaley v. Dawson, 2 Sch. & Lefr. 367.—A severance of the jointure may be inferred from the conduct of the parties: it is mere matter of evidence. It is not necessary to show a specific act of division of each part of the property, if there has been a general dealing sufficient to manifest the intention to divide the whole. The acts done as to parts may be evidence as to the rest, as to which no acts had been done. Per Lord Eldon, in Crooke v. De Vandes, 11 Ves. 333. So in the case of Jackson v. Jackson, 7 Ves. 535 and 9 Ves. 591, where, though by the residuary disposition to the testator's two sons, and the survivor, their or his heirs, executors, administrators, and assigns for ever, they took as joint-tenants the leasehold and personal estate embarked in trade; yet, upon all the circumstances, the transactions for twelve years, as between themselves a severance was to be implied, both as to the profits and the capital.‖

If a bequest of the residue of personal estate, which is a joint-tenancy, be employed by mutual consent *in trade*, this shall not amount to a severance, or defeat the right of survivorship.

Hall v. Digby, 4 Br. P. C. 224.

So, where two executors, joint-tenants of the residue of their testator's personal estate, divided the same, except a sum of 500*l.* 4 per cent. bank annuities, which they set apart to answer a life annuity of 20*l.* bequeathed by the will, and then one died, making the plaintiffs his executors; it was attempted to be argued, that this amounted to evidence of an intended severance of the whole property; but the lord chancellor determined, that in respect of the bank annuities, the claim of survivorship must prevail.

Baldwin v. Johnson, in Ch. 7th Feb. 1792. The prayer of the bill being, that the bank annuities should be transferred in trust to answer the annuity, in order to be forthcoming at the annuitant's death, and these divided in moieties, or to that effect, the bill was dismissed with costs. 2 Wooddes. 132; 2 Br. Ch. Rep. 455, S. C.; Willing v. Baine, 3 P. Wms. 113.]

‖Where a power was given to trustees *to make sale of, or convey in exchange* the estate for the best, or such other equivalent interest in lands as they should think proper, and for that purpose to revoke, and limit new uses; it was determined by Lord Chancellor Loughborough, (*a*) that the power authorized a partition; founding his opinion upon its being in effect an exchange, as the consequences and effects of a partition and exchange, as to the interests of the parties, are precisely the same. But this decision has been brought into question by what fell from Lord Eldon (*b*) in a subsequent case, who expressed his opinion very strongly both upon the argument, and afterwards in delivering his judgment, that a power to exchange would not authorize a partition. It was not necessary however for his lordship to infringe upon this decision in the case then before him, for in that case there was a power of sale only given, and such a power, he was clear, would not authorize a partition, whatever a power of exchange might do.

Abel v. Heathcote, 2 Ves. jun. 98; 4 Br. Ch. Rep. 278, S. C. (*a*) It had been argued before the lords commissioners, who inclined to think the power well executed, but made no decision, and recommended another argument. (*b*) M'Queen v. Farquhar, 11 Ves. 467. See also Mr. Sugden's Tr. of Powers, 466, &c., and the case

of Attorney-General v. Hamilton, 1 Madd. 214, before the vice-chancellor, whose learned and able argument strongly indicates his opinion, though he was not called upon to decide the point, that a power to *exchange* would not warrant a partition.

By the General Enclosure Act of 41 Geo. 3, c. 109, § 16, reciting, "that it may happen, that some of the proprietors of messuages, &c., and persons entitled to allotment or allotments to be made by virtue of any such act [of enclosure,] may be seised thereof in joint-tenancy, or as coparceners, or tenants in common, and cannot, by reason of infancy, settlement, or absence beyond seas, make an effectual division thereof; it is therefore enacted, that it shall be lawful for any such commissioner or commissioners, and he and they is and are hereby authorized and empowered (upon the request in writing of such joint-tenants, or coparceners, or tenants in common, or any or either of them, or of the husbands, guardians, trustees, committees, or attorneys of such as are under coverture, minors, lunatics, or under any other incapacity as aforesaid, or absent beyond seas) to make partition and division of the messuages, &c., and allotment or allotments to such of the said owners or proprietors who shall be entitled to the same, as joint-tenants, coparceners, or tenants in common; and to allot the same accordingly to such owners and proprietors in severalty; and from and immediately after the said allotments shall be so made and declared, the same shall be holden and enjoyed by the person or persons to whom the same shall be allowed in severalty in such and the same manner, and subject to such and the same uses, as the undivided parts or shares of such estates would have been held in case such partition and division had not been made."||

3. *At what Time such Disposition must be made to take effect.*

Regularly, every disposition by one joint-tenant to bind his companion must be (*a*) an immediate disposition; for the surviving joint-tenant claiming the whole by the original investiture, the whole must descend to him, unless his companion hath disposed of it from him in his lifetime.

Co. Lit. 168; Roll. Abr. 848. (*a*) That if one joint-tenant covenants to stand seised to the use, &c., of the moiety of his companion after his death, no use shall arise, because but a bare possibility; Noy, 14, though he survive his companion. Moore, 776.——If two joint-tenants be of a term, and the one of them grant to J S, that if he pay to him 10*l.* before Michaelmas, that then he shall have his term; the grantor die before the day; and J S pay the sum to his executors at the day, yet he shall not have the term, but the survivorship shall hold place; for it was in nature of a communication. Co. Lit. 184, 185.——That an agreement by one joint-tenant to alien will not be decreed in equity. 2 Vern. 63.

But, if two joint-tenants are in fee, and one lets his moiety to J S for years, to begin after his death, this is good, and shall bind the other, if he survives, because this is a present disposition, and binds the land from the time of the lease made, so that he cannot after avoid it.

Co. Lit. 185 a; Bro. tit. *Grants*, 154.

But a devise for years in such manner by one joint-tenant will not bind the other surviving, because that is no present disposition, nor binding on the devisor himself, inasmuch as he may revoke or cancel his will, and so destroy that devise.

Lit. § 289; 2 Roll. Abr. 848.

Also, if there be two joint-tenants of lands, and one of them devise away that which belongs to him and die, this is a void devise, and the devisee takes nothing, because the devise does not take effect till after the death of the devisor, (*b*) and then the surviving joint-tenant takes the whole by

a prior title, viz. from the first feoffment. But in this case if the devisor survive the other joint-tenant, then the devise is good for the whole, because he being the surviving joint-tenant, has the whole by survivorship, and then the words of the will are sufficient to carry the whole estate. Besides, at the time of making the will, though he was not sole tenant, yet he was seised *per mie et per tout*, and it is impossible to fix upon any particular part which he meant to devise, because he could not then call one part of the land more his own than another, and the most genuine construction seems to give the whole land, since he was seised *per tout* of it at the time of the devise.

Lit. § 287; Perk. § 500; Cro. Ja. 106; Moore, 776. (*b*) ‖ A will, says Lord Redesdale, so far as it is a disposition of property, is a designation of a special heir against the right of the person to whom the property would otherwise come by what may be called devolution of law; but that cannot, from the nature of the instrument, have the effect of depriving of a right a person who does not claim by devolution of law, but by virtue of a preceding gift or instrument. That must have been the ground on which it was established, that the will of a joint-tenant cannot sever the jointure. It is an instrument by which the maker is enabled only to bar his heir at law or representative, but which cannot be allowed to alter the rights of third persons. 1 Sch. & Lefr. 295.‖

Also, if there are two joint-tenants, and one of them surrenders his moiety to the use of his last will, and dies before the surrender is presented, having made his will, this is a severance of the jointure; for when presented, it relates to the time of the first surrender.

Co. Lit. 59 b; Roll. Abr. 501; 2 Roll. Abr. 88, pl. 2, 3; Porter v. Porter, Cro. Ja. 100.

If two joint-tenants for life are, and one of them makes a lease for years of his moiety, either to begin presently, or after his death, and dies, this lease is good and binding against the survivor. The reason whereof is, that notwithstanding the lease for years, the joint-tenancy in the freehold still continues, and in that they have a mutual interest in each other's life, so that the estate in the whole, or in any part, is not to determine or revert to the lessor till both are dead; for the life of the one, as well as of the other, was at first made the measure of the estate granted out by the lessor, and therefore so long as either of them lives, if the joint-tenancy continues, he is not to come into possession. Now these joint-tenants having a reciprocal interest in each other's life, when one of them makes a lease for years of his moiety, this does not depend for its continuance on his life only, but on his life and the life of the other joint-tenant, whichsoever of them shall live longest, according to the nature and continuance of the estate whereout it was derived; and then so long as that continues, so long the lease holds good, and, by consequence, such lessee shall hold out the surviving joint-tenant and the reversioner till the estate, whereout his lease was derived, be fully determined.

Poph. 96; Moore, 395; 3 Buls. 273; Roll. Rep. 401; Dyer, 187 a; Plow. 263; Cro. Ja. 91; Co. Lit. 184 b, 184 a, 186 a; 3 Buls. 131; 2 And. 16; 2 Vern. 323.

But, if a rent were reserved on such lease, this is determined and gone by the death of the lessor; for the survivor cannot have it, because he comes in by title paramount to the lease, and the heirs of the lessor have no title to it, because they have no (*a*) reversion or interest in the land.

Co. 96; Moore, 139; Co. Lit. 185 a, 318. (*a*) But *quære*, if the executors or administrators cannot maintain an action of debt or covenant, either upon the covenant in law or express covenant, for payment of the rent, if there be any.

A and B, joint-tenants for their lives, A, by indenture leases the moiety

which he holds in jointure with B, to C for sixty years from the death of B, if he the said A shall so long live, and demises the other moiety to C, for sixty years from his own death, if B shall so long live; then A dies, and B survives; and it was adjudged that this lease was void for both moieties; for by the first words it was a good lease from A, of his part upon the contingency of his surviving B, but that never happened; and as to B's part, A had not power to lease or contract for it during the life of B, though he had happened after to survive him, for that was but a bare possibility, which could not be leased or contracted for, and therefore the lease was void in the whole.

Whitlock v. Horton, Cro. Ja. 91; Moore, 776, S. C., by the name of Whitlock v. Hartwell, 2 Roll. Abr. 89, S. C., by the name of Whitlock v. Huntwell.

A and B, joint-tenants for their lives, A leases his part for sixty years, if he and B so long live; then B surrenders his part, and takes back a new estate; then A dies, living B; and it was adjudged, that this lease made by A was determined by his death; for the joint-tenancy, which would have given them or their lessees an interest in each other's life, is by the surrender of B determined and gone, and then the lease of A stood single upon his own life, and, consequently, by his death is determined. So, it would be, if after such lease for years by one joint-tenant they had made partition of the joint-estate, and then the lessor had died, his lease would be at an end, because the joint-tenancy, which should have supported it after his death, is by the partition defeated and gone.

Cro. Ja. 337; Roll. Rep. 309; 3 Buls. 130; 2 Roll. Abr. 131, Daniel and Waddington.

‖ By settlement on the marriage of A with B, lands were settled to the use of A for life, remainder to B for life, remainder to the heirs of B to be begotten. This estate-tail *descended* on C and D, the daughters of the marriage. The remainder in fee also descended to them as heirs of their mother's brother, and, consequently, from a person who had the fee distinct from the estate-tail. C levied a fine with proclamations of one moiety, and filed a bill in Chancery for a partition, and devised the lands, and the present bill was by persons claiming under C against persons claiming under D to revive the proceedings in the former suit. It was contended for the defendants, that C having a moiety in the estate-tail, the remainder to both sisters in fee, her fine would, as to the remainder in fee, only bind a moiety of that moiety, and not a moiety of the entirety; and it was alleged, that if she had been seised of a moiety in tail, with remainder to herself and a stranger in fee, her fine would clearly, as to the remainder in fee, have affected only a moiety of the moiety, and that the question only was, whether the sisters, being interested in the estate-tail, as well as the remainder in fee, could make any difference. But by Lord Kenyon, then master of the Rolls,—By the fine C obtained a base fee in that moiety in which she had an estate-tail. How can you differ the moiety in which she had the estate-tail from that in which she had the remainder in fee? It would be rather curious to distinguish the one from the other for the purpose of depriving her of the moiety in which she had an estate-tail. The estate-tail is now spent by the death of the sisters, and the reversion is fallen in. His lordship offered a case; which was afterwards sent to the Common Pleas, upon the question, whether C, under the settlement, and by her fine, acquired a fee-simple in any and

what parts of the estates settled? and the judges of that court concurred in the opinion of the master of the Rolls.

Church v. Edwards, 1 Br. Ch. Rep. 180. See 3 Prest. Convey. 90, &c., where the grounds of this decision, as well as that of Oakley v. Smith, are ably discussed.

Two persons, tenants in common, in tail, of a copyhold tenement, agreed on a partition, and by that agreement each tenant was to have particular parcels of the copyhold, and afterwards each person made a surrender to the other of the parcels allotted for that person. The defendant, the eldest son of one of the tenants in tail, contended, that the entail subsisted in a moiety of the original moiety of his mother, that is, the moiety of the entirety of those lands, which were allotted to her, and the master of the Rolls made a decree in his favour; which was affirmed on a re-hearing by Lord Keeper Henley, on the ground that the several daughters only barred a moiety of their respective estates, viz., allotments.

Oakley v. Smith, 1 Eden, 261; Ambl. 368, S. C.; 3 Prest. Conv. 103.‖

4. *What shall be a total Severance, or but for a limited Time.*

It hath been holden in equity, that if three persons are jointly interested in the trust of a term for years, and one of them mortgages his third part, that hereby the joint-tenancy is wholly severed, and that it was not like the case where a person makes his will, and afterwards mortgages his estate, in which it was agreed to be no total revocation; for my Lord Cowper held, that a joint-tenancy was odious in equity, and not like the case of a will, which might have been for the benefit of the mortgagor, and not have been revoked; but that it was to the disadvantage of the mortgagor that the joint-tenancy should continue; for thereby, if he happen to die first, all his estate and interest goes from his representatives to the survivor.

Salk. 158, York v. Stone. {A mortgage by two of three joint-tenants is a severance of the joint-tenancy. 1 Bin. 175, Lessee of Simpson v. Ammons.}

If there be two joint-tenants of a rent, and one of them disseise the tenant of the land, this severs the joint-tenancy for a time; for the moiety of the rent is suspended by unity of possession, and therefore cannot stand in jointure with the other moiety in possession.

Co. Lit. 188 a, 148 b, *supr.* (2).

If two joint-tenants be of a term, and the one grant parcel of the term to a stranger, by this the jointure of all is severed.

Cro. Eliz. 33, Syms's case. ‖ But in this case Manwood agreed, that if a man be possessed of a term in right of his wife, and grant parcel of it to another, yet, after the death of the baron, the feme shall have the residue of the term that was not granted, and it shall be only an alteration of what was granted.‖

5. *How far the Charges or Encumbrances of one Joint-tenant shall effect the Survivor.*

Regularly, all grants or charges by one joint-tenant out of the land fall off with his life, and cannot affect the survivor, because, there being no immediate disposition of the land itself, that comes whole and entire to the survivor under the first title, and by consequence, overreaches all intermediate charges or grants thereout by the other joint-tenant who is dead.

Lit. § 286; Co. Lit. 184 b; Bridgm. 43.

Therefore, if one joint-tenant acknowledge a recognisance, or a statute, or suffer judgment in an action of debt, &c., and die before execution had, it shall not be executed (*a*) afterwards; but, if execution be sued in the

lifetime of the conusor, it shall bind the survivor; also, in all these cases, if he that charges survive, it shall bind for ever.

Co. Lit. 184 b; 2 Roll. Abr. tit. *Joint-tenants*, (F), p. 1. 2. β An execution operates a severance. Davidson v. Heydon, 2 Yeates, 459. *g* (*a*) So, if one joint-tenant in fee-simple be indebted to the king, and die, after his decease no extent shall be made upon the land in the hands of the survivor. Co. Lit. 185 a.

But, if one joint-tenant grant *vesturam* or *herbagium terræ*, for years, and die, this shall bind the survivor. So, if two joint-tenants are of a water, and one grants a separate piscary for years, and dies, this shall bind the survivor; because in these cases, the grant of the one joint-tenant gives an immediate interest in the thing itself whereof they are joint-tenants.

Co. Lit. 186 b.

Also, though a statute or recognisance acknowledged by one joint-tenant shall not bind his companion, unless execution was taken out in the lifetime of him who acknowledged it; yet, if after such acknowledgment, the joint-tenant who acknowledged it had released to his companion, the land would be chargeable with the statute, though he who acknowledged it had died before execution, because his acceptance of the release prevents his claiming by survivorship.

Co. Lit. 184 b; 2 Roll. Abr. 88; 6 Co. 79, Lord Abergavenny's case.

So, if one joint-tenant in fee acknowledges a recognisance, and afterwards both joint-tenants bargain and sell the lands to a stranger, who re-conveys it to them, and then he who acknowledged the recognisance dies, the moiety of the land shall be charged with the recognisance, notwithstanding the survivorship.

2 Saund. 28.

6. *Of Severance by Operation of Law.*

If a man have issue three sons, and he devises to his two youngest sons lands to them jointly for their lives, and the eldest son, who hath the reversion in fee, dies, by which it descends to the second son, this, by operation of law, is a severance of the joint-tenancy.

2 And. 202.

So, if there be three joint-tenants for life, and the reversion be granted to one of them, the jointure is severed as to the third part of him to whom the reversion is so granted.

2 Co. 60 b, Wiscot's case; Co. Lit. 132 b, S. P.; Cro. Eliz. 481, 570, S. P.; 2 Saund. 386, S. C. cited.

If two joint-tenants levy a fine and declare no uses, they are seised as before.

2 Co. 58.

If land be given to two jointly with warranty, and one of them make a feoffment of his part, the warranty is lost as to him, but the other may vouch for his moiety; but, if they make partition, the warranty is lost as to both by the (*a*) common law.

Hob. 25. (*a*) But, if they make partition pursuant to the statute 31 H. 8, c. 1, & 32 H. 8, c. 32, the warranty remains, because they do it by compulsion. Co. Lit. 187; 6 Co. 12 b.

If one joint-tenant in fee take a lease for years of a stranger by deed indented, and die, the survivor shall not be bound by the conclusion, because he claims above it and not under it.

Co. Lit. 185 a.

7. *Of Severance by Compulsion of Law; and therein of the Writ* de Partitione faciendâ.

At common law joint-tenants and tenants in common were not compellable to make partition, except by the custom of some cities and boroughs. Lit. § 290; Co. Lit. 187.

But now by the 31 H. 8, c. 1, reciting the inconveniences which joint-tenants and tenants in common lay under, from one joint-tenant's or tenant's in common occupying the whole land, or receiving the whole profits, it is enacted, § 2. "That all joint-tenants or tenants in common that now be, or hereafter shall be of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements, or hereditaments within the realm of England, Wales, or the marches of the same, shall and may be coacted and compelled by virtue of this present act, to make partitions between them of all such manors, lands, tenements, and hereditaments, as they now hold, or hereafter shall hold as joint-tenants or tenants in common by writ *de partitione faciendâ*, in that case to be devised in the king's our sovereign lord's Court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law.

"Provided that every of the said joint-tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other, or of their heirs, to the intent to dereign the warranty paramount, and to recover for the rate as is used between coparceners after partition made by the order of the common law."

By 32 H. 8, c. 32, it is enacted, "That all joint-tenants and tenants in common, and every of them, which now hold, or hereafter shall hold, jointly or in common for term of life, year or years, or joint-tenants or tenants in common, where one or some of them have or shall have estate or estates for term of life or years, with the other that have or shall have estate or estates of inheritance or freehold in any manors, lands, tenements, or hereditaments, shall and may be compellable from henceforth by writ of partition to be purchased out of the king's Court of Chancery, upon his or their case or cases, to make severance and partition of all such manors, lands, tenements, and hereditaments which they hold jointly, or in common for term of life or lives, year or years, where one or some of them hold jointly or in common for term of life or years with others, or that have an estate or estates of inheritance of freehold.

"Provided, that no such partition or severance hereafter to be made by force of this act be, nor shall be prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties to the said partition, their executors or assigns."

Before these statutes the writ of partition was confined to coparceners: also, it lay against the alienee of a coparcener, for a coparcener cannot by her alienation divest the right of her sister to divide the estate, nor can she destroy her writ of partition; but the alienee had no such writ of partition, because such alienee took an undivided moiety; nor was the alienee under the reasons on which the law had founded such right of division, which was, that the inheritance might be separated after marriage into distinct families; and for the same reasons the tenant by the curtesy, though he came in by the act of law, could not have this writ, though it lay against him by the surviving coparceners.

Co. Lit. 175 a, 167 a; Dyer, 98 b. β Mussey v. Sanborn, 15 Mass. 156. The widow of intestate, tenant in common, cannot maintain an action of partition in the com-

mon law courts against the co-tenant of the intestate. Brown v. Adams, 2 Whart. 188. Nor can she be joined with the heirs in an action of partition in the common law courts against the co-tenants of the intestate. Power v. Power, 7 Watts, 205.*g*

But now by the force of these statutes, the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common.

Co. Lit. 175 a.

So, tenant by curtesy shall have a writ of partition upon the statute 32 H. 8, c. 32; for though he is neither joint-tenant nor tenant in common, yet being in equal mischief with those to whom the statute gives this remedy, he is within the equity thereof.

Co. Lit. 175 b. *β* Under the statute 32 H. 8, the termor of an undivided share might have a partition, though it would only bind during his term. North v. Guinan, 1 Beatt. 342.*g*

β The owners of the equity of redemption, as well as tenants in common for life or for years, may have a partition of their interest as between themselves.

Watten v. Copeland, 7 Johns. Ch. 140; Sebring v. Mersereau, Hopk. 501.*g*

But, if there be three coparceners, and a stranger purchase the part of one of them, he cannot join with either of the two coparceners in a writ of partition, either at common law or by force of the statute; for the words of the preamble of the statute are, *And none of them by the law doth or may know their several parts, &c., and cannot by the laws of this realm make partition without their mutual assents.* Now in this case one of them, viz. the parcener may have a writ of partition at common law, and therefore cannot come within the preamble and intent of the act, and so cannot join with the purchaser in a writ of partition brought upon it.

And 30, pl. 72; Co. Lit. 175 b; Keilw. 208; Dyer, 128; Bendl. 42, pl. 76.

It hath been holden, that a general writ by joint-tenants or tenants in common grounded on this statute, and concluding *contra formam statut.* is sufficient, without reciting the case particularly, so as to bring it within the statute; for the framing of the writ is left to the clerks in Chancery, and must be according to the form which they have devised.

Cro. Eliz. 742, 743; and vide Cro. Eliz. 759; 2 Lutw. 1018; 3 Leon. 231.

In this writ partition may be demanded of the view of frankpledge, together with a manor; for though it be not severable of itself, nor partible, yet the profits thereof may be divided, or it may be divided thus, that the one shall have it at one time, and the other at another; also, being demanded with the manor, it may well be entirely allotted to one, and the land in recompense to another.

Cro. Eliz. 759, Sir George Moor and Brown v. Onslow.

‖ These statutes do not extend to copyholds, because they provide, that it shall be done by writ of partition, and copyhold lands are not impleadable at common law.

Gilb. Ten. 185; Cro. Car. 44; Scott v. Fawcet, 1 Dick. 299. It is said at the end of Calthorpe, (Read, 98,) that it was agreed in the duchy chamber, that if two joint-tenants, copyholders in fee, make partition, it is good, and no forfeiture, nor alienation. But in N. (1) to Co. Lit. 59 a, (Hale's MSS.) it is said, that parceners of copyholds cannot make partition without the lord's license.

So, they do not extend to the customary tenements in the north of England, which are parcels of the respective manors in which they are

situate, and descendible from ancestor to heir by the hereditary right called tenant-right, and holden of the lord according to the custom.

Burrell v. Dodd, 3 B. & P. 378.‖

In this action there are two judgments; the first *quod partitio fiat inter partes prædictas de tenementis prædict. cum pertinen.* and upon this there goes out a judicial writ to the sheriff to make partition, which recites, first the writ of partition and judgment, and then commands the sheriff, together with twelve men of the vicinage, &c., to go in (*a*) person to the tenements to be divided, and there in presence of the parties, (if they appear on summons to be made) by the oaths of those twelve men, to make an equal and fair partition, and allot to each party their full and just share, and then return the inquisition of the partition annexed to the writ, under the seals of the sheriff, and the jurors, whose names are likewise to be returned.

Booth, 245; Lit. § 248; Co Lit. 167. (*a*) The sheriff must go in person, otherwise upon information thereof the court will stay the filing of the return, and award a new writ, for the writ being his commission, he cannot deviate from it; but, if the sheriff returns that he was there in person, and this return is received and filed, then any information to the contrary comes too late; because by the filing it is become matter of record, against which no averment *in pais* lies; neither can the party have error upon the return. Cro. Eliz. 9, 10, Clay's case.

When the inquisition is thus returned, upon motion made to the court, the second judgment is given in this manner: *Ideo considerat. est per Cur. quod partitio facta firma et stabilis in perpetuum teneatur.*

Co. Lit. 169; 2 Bl. Rep. 1159.

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ is directed to the sheriff to make partition, no writ of error lies hereupon, for the judgment is not complete till the sheriff's return, and the second judgment which the law requires hereupon, viz. *quod partitio*, &c., for before that, the plaintiff may be nonsuit, or he may, upon the return of the sheriff, suggest to the court that the partition is not equal, and so have a new partition, and may also release before the last judgment.

Roll. Abr. 750; Lord Berkley and Countess of Warwick, Cro. Eliz. 635; Moore, 643; Noy, 71, S. C. adjudged; Rawlins v. Barrett, Cro. Ja. 324; 2 Bulstr. 114, 119, S. P. adjudged, and see also 2 Roll. Rep. 125.

If the writ be brought by one joint-tenant against several, and there happen to be error in the execution of it, and one of the defendants release all errors to the plaintiff, this shall not bar the others; for each having a distinct interest shall not be prejudiced by the release of his companion.

Cro. Eliz. 65.

A and B tenants in common of a manor, A purchases several freeholds that lay so mixed with the demesne lands of the manor that they could hardly be distinguished from them; B brings a writ of partition of the manor only: and it was adjudged that partition should be made, and a writ awarded accordingly; upon the execution of which writ A comes to the sheriff and inquest, and informs them of the purchase of the freeholds, that are not parcel of the manor, and bids them take care how they make partition of all the lands within such a compass, lest they offer violence to their consciences; but does not show them the freeholds distinctly, nor the limits of the manor, which obliged the sheriff to adjourn to a certain day, on which one of the inquest made default; and thereupon the sheriff returns a fine of 40*s.* with account of the difficulties they met with, *et ulterius propter brevitatem temporis breve illud, exequi non potuit:* it was holden, that A ought to show

the bounds of the several freeholds that he purchased or the number of the acres: but, if no light or evidence is given by either party to the inquest, and they make partition *de tanto quantum resumitur et dignoscitur per præsumptiones et verisimilia*, it is good; for they are under an obligation to execute the commands of the court at their peril.

Dyer, 265; Dalton's Sheriff, 265.

If after the awarding of the judicial writ, and before the return of it, the defendant dies, yet the partition is good, and the writ shall not abate, because before the death of the defendant judgment was given that partition should be made; and though upon the return of the judicial writ there is another judgment given, yet that is given in confirmation of the first judgment. It seems likewise, that upon the return of the judicial writ, no exception can be taken to it; therefore, it is not material whether the defendant be dead or alive, since he can have no advantage by any plea on the return of the writ.

Dalison, 59.

The process in this writ is summons, attachment, and distress infinite.

F. N. B. 62; Booth, 245.

A and B were joint-tenants for years, B suffers C to occupy his moiety with him, and A brings a writ of partition against B, and C supposing that B had granted a moiety of his part to C, C shows that he was but tenant at will to B, whereupon the writ abated; whether A might have another with of partition against B by journeys' accounts was the question; and resolved, that he might; for the possession of C was good colour for bringing the writ of partition, and A could not take notice what estate C had.

Cro. Ja. 218, Beedle v. Clerk.

By the (*a*) 8 & 9 W. 3, c. 31, entitled an act for the easier obtaining partitions of lands in coparcenary, joint-tenancy, and tenancy in common, reciting, That the proceedings upon writs of partition between coparceners by the common law or custom, joint-tenants, and tenants in common, were found by experience to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of the manors, messuages, lands, tenements, and hereditaments to be divided, and the defective or dilatory executing and returning of the process of summons, attachment, and distress, and other impediments in making and establishing partitions, by reason of which divers persons having undivided parts or purparts, were greatly oppressed and prejudiced, and the premises were frequently wasted and destroyed, or lay uncultivated and unmanured, so that the profits of the same were totally or in a great measure lost; for remedy thereof it is enacted, "That after process of *pone*, or attachment returned upon a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant or tenants to the action, and a copy thereof left with the occupier, or tenant, or tenants, or, if they cannot be found, to the wife, son, or daughter, (being of the age of twenty-one years, or upwards,) of the tenant or tenants, or to the tenant in actual possession by virtue of any estate of freehold or for term for years, or uncertain interest, or at will of the manors, lands, tenements, or hereditaments whereof the partition is demanded, (unless the said tenant in actual possession be demandant in the action,) at least forty days before the day of return of the said *pone* or attachment, if the tenant or tenants to such writ, or any of them, or the true tenant to the messuages, lands, tenements,

and hereditaments as aforesaid, shall not in such case within fifteen days after return of such writ of *pone* or attachment cause an appearance to be entered in such court where such writ of *pone* or attachment shall be returnable, then in default of such appearance, the demandant having entered his declaration, the court may proceed to examine the defendant's title, and quantity of his part and purpart, and accordingly as they shall find his right, part and purpart to be, they shall for so much give judgment by default, and award a writ to make partition, whereby such proportion, part, and purpart may be set out severally; which writ being executed, after eight days' notice given to the occupier, or tenant or tenants of the premises, and returned, and thereupon final judgment entered, the same shall be good, and conclude all persons whatsoever, after notice as aforesaid, whatever right or title they have, or may at any time claim to have, in any of the manors, messuages, lands, tenements, and hereditaments mentioned in the said judgment and writ of partition, although all persons concerned are not named in any of the proceedings, nor the title of the tenants truly set forth."

(*a*) And made perpetual by the 3 & 4 Ann. c. 18, § 2. ‖The form here directed to be pursued, it is manifest, applies only to cases where the tenant does not appear. Dyer v. Bullock, 1 B. & P. 344. For the proceedings on the default of the tenant, see Halton v. Earl of Thanet, 2 Bl. Rep. 1134. {As to a commission of partition from Chancery, see 1 Fonbl. 15—19; Ambl. 589, Warner v. Baynes; 6 Ves. J. 498, Wills v. Slade; 8 Ves. J. 143, Turner v. Morgan; 11 Ves. J. 153. See 2 Mass. T. Rep. 462, Cook v. Allen.}

§ 2. "Provided always, That if such tenant or person concerned, or either of them, against whom or their right or title such judgment by default is given, shall within the space of one year after the first judgment entered, or in case of infancy, coverture, *non sanæ memoriæ*, or absence out of the kingdom, within one year after his, her, or their return, or the determination of such inability, apply themselves to the court by motion where such judgment is entered, and show a good and probable matter in bar of such partition, or that the demandant hath not title to so much as he hath recovered; then in such case the court may suspend or set aside such judgment, and admit the tenant and tenants to appear and plead, and the cause shall proceed according to due course of law, as if no such judgment had been given; and if the court upon hearing thereof shall adjudge for the first demandant, then the said first judgment shall stand confirmed and be good against all persons whatsoever, except such other persons as shall be absent or disabled as aforesaid; and the person or persons so appealing shall be awarded thereupon to pay costs; or if within such time or times aforesaid the tenants or persons concerned, admitting the demandant's title, parts, or purparts, shall show to the court any inequality in the partition, the court may award a new partition to be made in presence of all parties concerned, (if they will appear,) notwithstanding the return and filing upon record of the former, which said second partition returned and filed shall be good and firm for ever against all persons whatsoever, except as before excepted."

{See 2 Mass. T. Rep. 479; 2 Bin. 1.}

§ 3. "And it is further enacted, That no plea in abatement shall be admitted or received in any suit for partition, nor shall the same be abated by reason of the death of any tenant."

§ 4. "And it is further enacted, That when the high sheriff by reason of distance, infirmity, or any other hinderance, cannot conveniently be

present at the execution of any judgment in partition, in such case the under-sheriff, in presence of two justices of the peace of the county where the lands, tenements, or hereditaments to be divided do lie, shall and may proceed to execution of any writ of partition by inquisition in due form of law, as if the high sheriff were then personally present; and the high sheriff thereupon shall, and is hereby enabled and required to make the same return as if he were personally present at such execution. And in case such partition be made, returned, and filed, he or they, that were tenant or tenants of any of the said messuages, lands, tenements, and hereditaments, or any part or purpart thereof, before they were divided, shall be tenant or tenants for such part set out severally to the respective landlords or owners thereof, by and under the same conditions, rents, covenants, and reservations, where they are or shall be so divided; and the landlords and owners of the several parts and purparts so divided and allotted as aforesaid, shall warrant and make good unto their respective tenants the said several parts severally after such partition, as they are or were bound to do by any copy, leases, or grants of their respective parts before any partition made; and in case any demandant be tenant in actual possession to the tenant to the action for his part and proportion, or any part thereof, in the messuages, lands, tenements, and hereditaments to be divided by virtue of a writ of partition as aforesaid, for any term of life, lives, or years, or uncertain interest, the said tenant shall stand and be possessed of the said purparts and proportions for the like term, and under the same conditions and covenants, when it is set out severally in pursuance of this, or any other act, statute, or law, for that purpose."

§ 5. "And it is further enacted, That the respective sheriffs, their under-sheriffs and deputies, and, in case of sickness or disability in the high sheriff, all justices of the peace, within their respective divisions, shall give due attendance to the executing such writ of partition, unless reasonable cause be shown to the court upon oath, and there allowed of, or otherwise be liable every of them to pay unto the demandant such costs and damages as shall be awarded by the court, not exceeding five pounds, for which the demandant or plaintiff may bring his action in any of his majesty's courts of record at Westminster, wherein no essoign, protection, privilege, or wager of law shall be allowed, nor any more than one imparlance; and in case the demandant shall not agree to pay the sheriffs or under-sheriffs, justices, and jurors such fees as they shall respectively demand for their pains and attendance in the execution of the same, and returning thereof, then the court shall award what each person shall receive, having respect to the distance of the place from their respective habitations, and the time they must necessarily spend about the same, for which they may severally bring their actions as aforesaid."

By the 7 Ann. c. 18, it is enacted, "That if coparceners, or joint-tenants or tenants in common be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn."

β Lands lying in common and undivided are subject to partition, notwithstanding the proprietors are a body politic, and from time immemorial have been accustomed at their corporate meetings to exercise the exclusive right of dividing, managing, and improving such lands.

Mitchell v. Starbuck, 10 Mass. 5.*g*

‖ But the proceeding by writ of partition is now of rare occurrence, and like that by writ of dower, and nearly from the same causes, is fast sinking into entire disuse. The Court of Chancery, at first acting only in aid of the common law court, then assuming a concurrent, has at length obtained an almost exclusive jurisdiction over the subject. That it has no original jurisdiction, nor any express authority from statute, has been acknowledged by those who were most conversant with its jurisdiction, and have best administered it: the general reception it has met with is owing to the advantage it has over the common law court, in being loose and free from all technical restraints; and to the powers it possesses of dealing with and providing for the various interests it may meet with.

Mundy v. Mundy, 2 Ves. jun. 124; Calmady v. Calmady, Ibid. 569; Agar v. Fairfax, 17 Ves. 552. β A court of chancery has concurrent jurisdiction with a court of law, to compel partition between joint-tenants and tenants in common. Parmers v. Respass, 5 Monr. 564; Coleman v. Hutchinson, 3 Bibb, 209; Beeler's heirs v. Bullit's heirs, 3 Marsh. 283.*g* Mr. Hargrave considers this proceeding by commission as an innovation on the common law, and says it was little known even in the reign of Charles the First. Co. Lit. 169, n. Mr. Fonblanque insists that a practice, which can be traced back to the time of Elizabeth, (as high as the Equity Reports will carry us,) is not to be described as a new mode. 1 Eq. Tr. 19, (4th edit.) No doubt, the partition by commission is modern, compared with that by writ. But in 1686, we find that bills for partition had then become common; Earl of Kildare v. Eustace, 1 Vern. 421, and at a still earlier period, in 1677, Lord Chancellor Nottingham said, in the case of Manaton v. Squire, 2 Freem. 26, that the chancellor had equal power to make partition by commission, as the common law had by writ of partition, and added with some warmth, "that he did no more question the jurisdiction of the Chancery in this case, than he did, whether a gift to a man and his heirs were a fee simple." It is reported in the case of Earl of Kildare v. Eustace, *ubi supra*, and thence transferred into several books, to have been said in argument, that "this jurisdiction was grounded on the statute, which makes one tenant in common accountable to the other, so that since the statute they had become, as it were, trustees, the one for the other." I know of no statute to that effect, but the statute for the amendment of the law of 4 Ann. c. 16, the last section of which extends the action of account to joint-tenants and tenants in common against their co-tenants, and to that statute we are referred in one book, but the argument in which this passage has been introduced was delivered about twenty years before the statute was passed.

β In Pennsylvania, an equitable estate is sufficient to support an action of partition.

Willing v. Brown, 7 S. & R. 467.*g*

Under the common law process, the plaintiff must prove his title, as he declares, and also the titles of the defendants, and judgment is given for the partition according to the respective titles so proved. The proceeding in equity avoids this difficulty, which must in most cases be extreme. The plaintiff, however, in that court must state upon the record his own title, and the titles of the defendants.(*a*) And here a greater strictness is required than at law: (*b*) it is not enough for the plaintiff in equity to allege generally that he is in possession, as at law, to state seisin; but he must show a title in himself; for the decree in equity acts only *in personam*, not as the judgment at law does, *in rem*, and therefore in equity conveyances must be executed to effectuate the partition. With a view then to a judgment for partition in equity, the court orders inquiries to ascertain who are, together

with the plaintiff, entitled to the whole subject. If therefore the state of the record, as originally framed, is not such as to authorize the court to say, that the plaintiff and the defendants are respectively entitled in distinct shares comprehending the whole subject, a reference will be directed to the master to ascertain what are the estates and interests of the plaintiff and the defendants respectively; and if it appears, that they, or some of them, are entitled to the whole, a partition is ordered according to the rights of all, or such of them, as appear entitled; and the bill is dismissed as against those, who do not appear to have any right.

Agar v. Fairfax, 17 Ves. 552. (*a*) A statement in the bill that the defendant "is seised in fee-simple of, or otherwise entitled to," an aliquot part of the property, is sufficiently certain. Baring v. Nash, 1 Ves. & Beam. 55. (*b*) Cartwright v. Pulteney, 2 Atk. 380; Agar v. Fairfax, *ubi supra*.

Again, under the writ, those only are bound, who are entitled to a subsisting estate, not those entitled in remainder: but in equity, those in remainder will be bound, as well as those who have a particular estate. The bill therefore is now considered as equally a matter of right with the writ. In some cases, indeed, it appears to be discretionary in the court, as, where the title is merely legal, and under very suspicious circumstances; but, generally speaking, it is due in all those cases where the writ lies; (*a*) and on the other hand, where the writ does not lie, as in the case of (*b*) copyholds, or the land being in another kingdom, (*c*) the bill does not lie. (*d*)

(*a*) It is due therefore for a limited partition during a tenancy for life; Wills v. Slade, 6 Ves. 498; or during a term of years, Baring v. Nash, *ubi supra*; for in both cases there is an equal title to the writ under the statute of Henry 8. (*b*) Scott v. Fawcet, 1 Dick. 299. But in Dodson v. Dodson, at the Rolls, 1795, copyholds as well as freeholds were included in the decree for partition; and it is said to be the common practice. Allnatt's Law of Partition, 94. But see Oakley v. Smith, 2 Eden, 261. (*c*) Earl of Kildare v. Eustace, 1 Vern. 421; 2 Ch. Ca. 189; S. C.; Cartwright v. Pettus, Ibid. 214. (*d*) In some cases the bill lies where the subject would not be divisible at law, as in the case of tithes. Baxter v. Knollys, 1 Ves. 494; Gwill. 826; Parker v. Gerard, Ambl. 236; Baring v. Nash, 1 Ves. & Beam. 551; Cartwright v. Pulteney, 2 Atk. 380.

ß On the death of one or more plaintiffs, in an action of partition, after judgment *quod partitio fiat*, the action does not abate.

Frohock v. Gustine, 8 Watts, 121.

On the plea of *non tenent insimul*, the plaintiff is not required to prove an adverse holding for twenty-one years.

Law v. Patterson, 1 Watts & Serg. 184.ß

The bill being a matter of right, the difficulty of making the partition is no objection; if it be insisted upon, though attended with the most monstrous inconvenience, and even destruction, the cause must proceed.

Parker v. Gerard, *ubi supra*; Warner v. Baynes, Ambl. 589; Turner v. Morgan, 8 Ves. 143.‖ ßA bill for partition does not lie, when the defendant is in possession, claiming adversely. Martin v. Smith, Harp. Eq. R. 106; Wilkin v. Wilkin, 1 Johns. Ch. R. 111.ß

ß The power of a court of equity to grant partition is not discretionary, but *ex debito justitiæ*; and whenever a plaintiff has a right to partition at law, he has the same right in equity.

Wiseley v. Findlay, 3 Rand. 361. See Coleman v. Hutchinson, 3 Bibb, 209.

Tenants in common of personal property cannot have partition at common law; and therefore a court of equity is the proper tribunal to decree a partition of it.

Smith v. Smith, 4 Rand. 95. See Kerley v. Clay, 4 Bibb, 241

A partition is a matter of right, and may be called for at any time.

Collins v. Dickinson, 1 Hayw. 240. See Straughan v. Wright, 4 Rand. 493; North v. Guinan, 1 Beat. 342.*g*

[Where a partition was decreed of an estate, two-thirds whereof belonged to A and one-third to B, and the estate consisted *inter al.* of a great house and park, and of a farm and lands about it of 1000*l. per annum;* and B insisted to have a third of the house and park assigned to him; contending, that as at law, in case of a writ, a tenant in common should have half a house, every other toll-dish, and every other turn of a church: so equity in the present case followed the law; Lord Chancellor Parker held, that though B must have a third part in value of this estate, yet there was no colour of reason that any part of it should be lessened in value, in order that he might have a third part of it; and that if B should have one-third of the house and park, this would very much lessen the value of both; he recommended therefore, that the seat and park should be allotted to A, A having two-thirds; and that a liberal allowance out of the rest of the estate should be made to B in lieu of his share of the house and park. He further said, if there were three houses of different value to be divided between three, it would not be right to divide every house; for that would be to spoil every house; but some recompense is to be made, either by a sum of money, or rent for owelty of partition, to those that have the houses of less value. It is true, he continued, if there were but one house, or mill, or advowson to be divided, then this entire thing must be divided in manner as had been contended; *secùs*, where there are other lands which may make up the defendant's share. By this reason every farm-house upon the estate must be divided, which would depreciate the estate, and occasion perpetual contention; and it may be the intent of the defendant, when this partition is made, to compel the plaintiff to give him forty years' purchase for his third of the house and park.

Earl of Clarendon v. Hornby, 1 P. Wms. 446. See acc. Turner v. Morgan, 8 Ves. 143.]

‖ Where several parties were seised as tenants in common of the whole interest in the soil and freehold of a certain moor, but the proportion to which each was entitled was uncertain; the moor having been conveyed to them under different instruments, in shares proportionate to certain other estates purchased by them, and the value they should be of respectively when the moor should be enclosed; it was objected, that on account of the uncertainty of the interests no partition could be made; yet the master of the Rolls said, that that was no objection, as the parties were not the less tenants in common, though an operation must be performed before it could be ascertained to what undivided shares they were entitled as such. It must be seen what was the value of their shares in the other estate, by reference to which that allotment was to be made; and then they would be in the situation of parties having ascertained interests in the moor: but still they were tenants in common, and therefore had a right to a partition. And he decreed a reference to the master, and a commission accordingly, which decree was afterwards affirmed by the chancellor, with some variation in point of form.

Agar v. Fairfax, *ubi supra.*

A covenant not to enclose but with the consent of all parties, is no obstacle to a partition. Partition does not require enclosure, but only that an allotment shall be made to each by metes and bounds.

Agar v. Fairfax, *ubi supra.*

(K) Joint-tenants, &c., how to sue and be sued.

Rights of common over the land to be divided are no objection to a partition. The partition regards only the freehold and inheritance of the soil. Rights of common are merely easements, and no interests in the soil, and, consequently, cannot be affected by a division of the soil between the owners.

Agar v. Fairfax, *ubi supra.*

A court of equity will decree a partition as well where one of the parties is an infant, as where they are both adult. But the decree in the former case is not final, extending only to make the partition, gives possession, and order enjoyment accordingly, until effectual conveyances can be made. A day is given to the infant to show cause against the decree after attaining twenty-one; and if no cause should be then shown, or the cause shown should not be allowed, the decree will be extended to compel mutual conveyances which are the final completion of the partition.

Lord Brook v. Lord and Lady Hertford, 2 P. Wms. 518; Tuckfield v. Buller, Ambl. 197; 1 Dick. 240, S. C.; Hubble v. Read, before Lord Thurlowe, noticed in 1 Dick. 243, marg.; Attorney-General v. Hamilton, 1 Madd. 214; Mitf. Eq. Pl. 97.

There are no costs upon a writ of partition, so that he who procures the partition must be at the whole expense, unless the other will be at the expense for his own convenience. And as the party chooses to come into equity, instead of going to law, the rule of law is adopted, and therefore no costs are given until the commission; and the costs of issuing, executing, and confirming the commission are to be borne by the parties in proportion to the value of their respective interests; and there are no costs of the subsequent proceedings.

See Metcalf v. Beckwith, 2 P. Wms. 377; Norris v. Le Neve, 3 Atk. 83, cited in Ambl. 236, and 2 Ves. jun. 568; Cornish v. Gest, 2 Cox, 27; Hyde v. Hindley, Ibid. 408; Calmady v. Calmady, 2 Ves. jun. 568; Agar v. Fairfax, 17 Ves. 552; Baring v. Nash, 1 Ves. & Beam. 554.‖

℔ A tenant in common, who is in possession, supposing himself legally entitled to the whole of the premises, erects valuable buildings thereon, is entitled to an equitable partition of the premises, so as to give him the benefit of his improvements.

Tower v. Needham, 3 Paige, 545.

A partition must be in the jurisdiction where the lands lie.

Taylor v. Bate, 4 Dana, 202.

The bare fact that part of the land of which partition is sought by bill in Chancery, is adversely held by one joint-tenant or tenant in common, will not prevent the court from taking jurisdiction to decree the partition, before the controversy as to the title is settled at law.

Overton's heirs v. Woolfolk, 6 Dana, 374.

When the title set up by the complainant in a bill for partition is equitable only, the court will retain the bill, decide the controversy as to titles, and give relief.

Overton's heirs v. Woolfolk, 6 Dana, 374.℣

(K) Joint-tenants and Tenants in common, how to sue and be sued: And herein of Summons and Severance.

JOINT-TENANTS being seised *per mie et per tout*, and deriving by one and the same title, must jointly implead and be jointly impleaded by others.(*a*)

Co. Lit. 180 b. (*a*) ‖ If therefore one tenant in common only be sued in trespass, trover, or case, for any thing respecting the land holden in common, he may plead the

(K) Joint-tenants, &c., how to sue and be sued.

joint-tenancy in abatement; though it would be otherwise in a mere personal action of tort, 7 H. 5, 8 b, *per* Skrene; Br. tit. *Action sur le Case*, 32, *Jointenancie*, 12; Mitchell v. Tarbutt, 5 T. R. 641. ‖

So, though one joint-tenant may distrain for rent, yet he cannot bring an action of debt, nor (*a*) avow for rent arrear without making himself bailiff to his companions, that they may be privy to the suit, and be entitled to their shares upon his recovery thereof in their right.

Carth. 328, Pullen v. Palmer; 5 Mod. 72, 150, S. C. (*a*) That joint-tenants must join in the avowry for damage-feasant. Thomps. Ent. 264; 5 Mod. 151.

If A and B, joint-tenants, A for life, and B in fee, join in a lease for life, A has a reversion, and shall join in an action of waste; but the writ must be *ad exhæredationem* of B, because he only hath the inheritance.

Co. Lit. 42 a, n. 4.

But, if two joint-tenants acknowledge a statute, and their several lands are taken in execution, and after, upon the invalidity of the statute, they jointly bring an *audita querela*, the writ shall abate; for they ought to have several writs; for the wrong done to one by the execution of his land is no tort to the other.

Noy, 1, Farmer v. Downs, adjudged.

And although regularly joint-tenants are to join and to be joined in an action, yet it is otherwise with tenants in common; and therefore if in ejectment the plaintiff declares on a lease made by A and B, and on the trial it appears that they are tenants in common, the plaintiff cannot recover; but, if A and B had been joint-tenants, a joint-lease to the plaintiff had been good, and he might have declared *quod demiserunt*. And the reason of the difference is, that tenants in common are of several titles, and therefore the freehold is several; and if they are disseised, they shall be put to their several actions; as therefore the lands of tenants in common are to be considered as different estates depending on different titles, the plaintiff shall not recover, because that were to allow the plaintiff to try two several and different titles in one issue at the same time, and therefore the plaintiff to make out his title must show and prove that each demised the whole to him, else he doth not prove the declaration; whereas the discovery of the tenancy in common proves the contrary; and as they have different titles to a moiety only, so they could not each of them demise the whole. But joint-tenants are seised *per mie et per tout*, and they derive by one and the same title, and therefore each may be said to demise the whole;(*b*) and as they must join in an action for any violation of their possession, so for the same (*c*) reason too, their lessee on their joint demise.

Show. Rep. 342; 2 Vent. 214; Comb. 190; Carth. 224; Mod. 102; Co. Lit. 200; 2 Wils. 232. ‖ (*b*) But *qu.* for to enfeoff, give, or demise, joint-tenants have each but a right to a moiety; and where all join in a feoffment, every of them, in judgment of law, gives but his part. Co. Lit. 186 a. So, if all join in a demise in law, it is the demise by each of his portion. As therefore each demises only his own share, each may put an end to that demise, whether his companion join with him or not, and may recover it in an ejectment without joining his companion. Doe v. Chaplin, 3 Taunt. 120. ‖ (*c*) But *note*, That to avoid any difficulty in those cases, the best way seems to be for them to join in a lease to a third person, and that lessee to make a lease to try the title. Noy, 13.

But, though tenants in common having (*d*) several and distinct rights cannot join in an action, yet, where the thing is (*e*) entire, as a horse or hawk, they must join, these being in their nature not severable, and therefore from the necessity of the case the law admits them to join.

Lit. § 314; Co. Lit. 197 a. (*d*) Cannot join, though they come in by one feoffment

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Mod. 11. (*e*) And therefore tenants in common shall join in a *quare impedit*, because the presentation to the advowson is entire. Co. Lit. 197 b.—And for this reason tenants in common of a seignory shall join in a writ of right of ward, and ravishment of ward for the body. Co. Lit. 197 b.—Also tenants in common shall join in detinue of charters, and if the one be nonsuit, the other shall recover. Co. Lit. 197 b.—And shall join in a *warrantia chartæ*, but sever in voucher. Co. Lit. 197 b. [And wherever one entire injury is done to tenants in common, they shall have one entire remedy. 2 Bl. Rep. 1077.] (β) Tenants in common cannot join in a real action; they must sue severally for their undivided rights. Rehoboth and Sekonk v. Hunt, 1 Pick. 228. (γ)

So, if there be two tenants in common, and they make a lease for life, rendering rent, this reservation, though made by joint words, shall follow the nature of the reversion, which is several in the lessors; therefore they shall be put to their several assizes if they be disseised, as if there had been distinct reservations.

Co. Lit. 197 b; Moore, 202.

Also, tenants in common shall join in actions personal, as trespass in breaking into their house, breaking their enclosure or fences, feeding, wasting, or defouling their grass, cutting down their timber, fishing in their piscary, &c., and shall recover jointly their damages; because in those actions, though their estates are several, yet the damages survive to all; and it would be unreasonable to bring several actions for one single trespass.

Lit. § 315; Co. Lit. 198 a.

So, if there be two tenants in common of a manor, and they make a bailiff thereof, and one of them die, the survivor shall have an action of account, for the action given unto them for the arrearages upon the account was joint.

Co. Lit. 189 a.

So, if two tenants in common sow their land, and a stranger eateth the corn with his cattle, though they have the corn in common, yet the action given to them for the trespass is joint, and shall survive.

Co. Lit. 189 a.

Tenants in common may join or sever in (*a*) debt or covenant for rent; but, if they sever, the demand must be *de unâ medietate* of the whole rent, and not of a certain sum, which amounts to a moiety.

Carth. 289, Midgley and Gilbert v. Lord Lovelace. (*a*) But in an avowry they ought to sever, because it is in the realty. Co. Lit. 188 b; 5 T. R. 249. [If a tertenant pay the whole rent to one tenant in common contrary to the express notice of the other, the latter may distrain for his share. Harrison v. Barney, 5 T. R. 246.]

And as in trespass tenants in common shall join, so they shall for a nuisance done to their land, for it is personal, and concerns the profits of the land; but for forging of false deeds they shall sever, for that concerns the inheritance of the land. (*b*) As to a nuisance, if it be continued after the death of one of the tenants in common, his devisee shall join in action with the survivor, for the continuance thereof is as the new erecting of such a nuisance.

Cro. Ja. 231, Some v. Barwish. [(*b*) And where the injury is separate, they may have several actions: and therefore, one tenant in common may sue for the double value of his moiety of the rent under the statute of 4 Geo. 2, c. 28. Cutting v. Darby, 2 Bl. Rep. 1077.]

A makes a lease, in which the lessee covenants with the lessor, &c., to repair; lessor grants his reversion by several moities to several persons, and lessee assigns to J S. In an action of covenant by the grantees of the reversion for not repairing, the question was, If two tenants in common of a

reversion could join in bringing an action of covenant against the assignee? and it was holden, that they could and ought to join in this case, being a mere personal action, according to Littleton's rule, which was holden to be general, without relation to any privity of contract; and that the covenant being indivisible, the wrong and damages could not be distributed because uncertain.

Mich. 15 Car. 2; Kitchen and Knight v. Buckley, Lev. 109; Sid. 157, S. C.; Keb. 565, 572, S. C.; Raym. 80, S. C.; and vide to this purpose Keilw. 14; 18 H. 6, 6, 7; 28 E. 3, 90; Moore, 40; Godb. 90, 283; Bro. *Joinder in Action*, 104; Bendl. 89. ‖ Where the plaintiff claimed by two grants of the reversion, by several deeds, and at several times, the one in fee, the other for years, and for breach of covenant in not repairing, it was objected that he ought to have brought several actions; the court held, that this was a mere personal action, in which tenants in common might join; and in this case, as stated in Levinz's report of the case in the text, the plaintiff was tenant in common with himself, having the fee in part of the reversion, and for years only in the residue of the reversion. Pyott v. Lady St. John, Cro. Ja. 329.‖

Joint-tenants and tenants in common are to join in a *quare impedit;* the first, because they are jointly seised, and claim by a joint-title; the (*a*) latter out of necessity, because the thing is entire.

Co. Lit. 197 b; 2 And. 23, 63; Comp. Incumb. 253, and vide *supra*, 7 Ann. c. 18. (*a*) If two tenants in common be of an advowson, and they bring a *quare impedit*, and the one release, yet the other shall sue for and recover the whole presentment. Co. Lit. 197 b.

If joint-tenants or tenants in common refuse to set out their tithes, the action must be brought against them both; but, if one of them only occupy the land, the action is to be brought against him. Or if one joint-tenant or tenant in common sets out the tithes, and the other takes them away, the action must be brought against the wrong-doer.

Hut. 121; Cro. Ja. 86, 362.

If a lease for years be made to B and C, rendering rent, and C assign his moiety to D, and after the rent be in arrear, the lessor may bring an action of debt for the rent against B and D, for the reversion remains entire.

Waldron v. Vicars, Palm. 283.

If two joint-tenants bring trespass, and pending the action one of them dies, the writ shall abate; *secus*, if brought against them; for in the latter case the action is both joint and several.*

Cro. Ja. 19; 4 Mod. 249, S. P. *By 8 & 9 W. 3, c. 11, § 7, the death of one plaintiff, or defendant, where there is another surviving, shall not abate the suit.

Also, where a *quare impedit* is brought by two joint-tenants, and pending the action, one of them dies, the writ shall not abate; and this out of necessity, lest the six months should elapse, and thereby the action be lost.

Cro. Ja. 19. ‖ In equity, if two joint-tenants file a bill, and one of them dies, the interest survives, and there is no abatement. But where one of two tenants in common, co-plaintiffs in equity, dies, the suit abates, and cannot be revived, without making the survivor a co-plaintiff, or a defendant. Fallowes v. Williamson, 11 Ves. 306.‖

If one joint-tenant refuses to join in action, he may be summoned and severed. But herein it is to be observed, that if the person severed dies, the writ abates, because the survivor then goes for the whole, which he cannot do on that writ, where on the summons and severance he went only for a moiety before, for the writ cannot have a double effect, to wit, for a moiety in case of summons and severance, and for the whole in case of survivorship. And the law is the same if such joint-tenants proceed without summons and severance; for since both by the writ might by possibility

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recover their moieties, they shall not go on for the whole in case of survivorship, because the words and effect of the writ at the time of its first purchasing was that each might recover his moiety, and therefore a new writ must be purchased to enable one to proceed for the whole.*

Co. Lit. 188. * See the preceding note.

But in personal and mixed actions where there is summons and severance, and yet after such summons and severance the plaintiff goes on for the whole, there, if one of them dies, yet the writ shall not abate, because they go on for the whole after summons and severance; and if they were to have a new writ, it would only give the court authority to go on for the whole.

Co. Lit. 197.

So, if two joint-tenants bring a writ of ward, and they are summoned and severed, and the severed person dies, the writ shall not abate, because after such severance he went on for the whole; and so he does in this case, after the death of his companion.

Co. Lit. 197.

So, in a *quare impedit* by two joint-tenants, and one is summoned and severed, and the severed person dies, the writ shall not abate, because the advowson is an entire thing; and he proceeded for the whole after the severance, and so he may after the death, &c.

Co. Lit. 197 b; Dyer, 279.

If two joint-tenants bring an assize, and the one is severed, if it be found that the other had goods taken upon the land, he shall recover sole damage for them.

11 H. 4, 17; Roll. Abr. 571.

Wherever tenants in common ought to join in an action, and one alone brings the action, the defendant ought to plead the tenancy in common in abatement, which is a defence the law allows him, that he may not be twice charged; but, if he plead in chief, and it be found against him, the plaintiff shall have judgment, because he loses the opportunity of pleading in abatement by pleading to the right of the action.

‖ Haywood v. Davies, 1 Salk. 4; Blackborough v. Graves, 1 Mod. 102; Nelthorp v. Dorrington, 2 Lev. 113; Boson v. Sandford, Carth, 63; Bull. N. P. 35. Here however we must distinguish in suits brought *by* persons having a joint interest between matter of tort and matter of contract. With respect to actions of tort, such a trespass *quare clausum fregit*, or for taking goods, trover, case for malfeasance, misfeasance, or non-feasance, and suchlike actions of tort, it seems fully established, that if one only of two or more joint-tenants, parceners, tenants in common, executors, &c., who regularly ought to file or bring any *such* actions, the defendant must plead the omission in abatement, and cannot give it in evidence on the general issue, or in any other way, or by pleading in bar, or in arrest of judgment, or though the matter be found specially, or appear on the face of the declaration or any other pleading of the plaintiff. Deering v. Moor, Cr. Eliz. 554; Harman v. Whitchlow, Latch. 152, *per* Jones, J.; Blackborough v. Graves, *ubi supra*; Boson v. Sandford, *ubi supra*; Nelthorp v. Dorrington, *ubi supra*; Dockwray v. Dickenson, Skin. 640; Child v. Sandys, 1 Salk. 32; Hayward v. Davies, Ibid. 4; Brown v. Hedges, Ibid. 290; Leglise v. Champante, 2 Str. 820; Addison v. Overend, 6 T. R. 766; Sedgworth v. Overend, 7 T. R. 279; Bloxam v. Hubbard, 5 East, 420. But, where one only of several covenantees, or obligees brings an action, without averring in the declaration that the others are dead, the defendant need not plead it in abatement, but may take advantage of it at the trial, as a variance, on the plea of *non est factum*, or pray oyer of the deed and demur generally. So, where the action is brought by one of several with whom any contract has been made, the defendant may take advantage of it upon evidence at the trial upon the plea of *non assumpsit*; or, if it appears on the face of the declaration, that the contract was made with others as well as with the plaintiff, it will be error. Slingsby's case, 5 Co. 18 b; Eccleston v. Clips-

ham, 1 Saund. 153; Leglise v. Champante, 2 Str. 820; Vernon v. Jefferys, Ibid. 1146; Cabell v. Vaughan, 1 Saund. 291; 1 Ventr. 34, S. C.; Saunders v. Johnson, Skin. 402; Scott v. Godwin, 1 Bos. & Pull. 67. But, if one only of several joint obligors, covenantors, or contractors, is sued, he must plead the matter in abatement, and cannot take advantage of it afterwards on any other plea, or in arrest of judgment, or give it in evidence. Indeed, if it appears on the face of the declaration, or any other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that he is still living, as is supposed to have been the case in Horner v. Moore, cited in 5 Burr. 2614 if both these facts be admitted by the plaintiff, the court will arrest the judgment, because the plaintiff himself shows, that another ought to be joined, and it would be absurd to compel the defendant to plead facts, which are already admitted, 2 Saund. 291 b, note (4), Wms's edit; Rice v. Shute, 5 Burr. 2611; Abbott v. Smith, 2 Bl. Rep. 947; Rees v. Abbott, Cowp. 832.‖

If joint-tenancy be pleaded by fine or deed in abatement of the demandant's action, he cannot take a general averment that the tenant is sole seised, for that were directly to contradict them, and set them aside by a matter of less force and solemnity than they are; but he may confess the joint-tenancy which the tenant pleads after the fine levied, but that the joint-tenant not named released to the tenant before the writ brought, or that both the conusees enfeoffed one, who re-enfeoffed the tenant. But at this day, if the tenant had been enfeoffed by deed, and had pleaded joint-tenancy to abate the demandant's writ, the demandant might have averred generally, that the tenant is sole seised, for the statute of 34 E. 1, *de conjunctim feoffatis* extends to joint-tenancy by deed though not by fine; but by the common law the demandant was not allowed that plea, where the tenant claimed under a deed any more than when he claimed under a fine. But, if the tenant claim by feoffment *in pais*, and plead that in abatement of the demandant's action, the demandant may aver sole tenancy, because the feoffment is to be proved *vivâ voce per pares*, whose credit is not more regarded by the court than the demandant's.

2 Inst. 523, 524.

If chattels owned in common are taken on execution against one cotenant, the other has no authority to take them from the officer.

Badlam v. Tucker, 1 Pick. 400.

The officer may levy upon the whole, but he can sell only the undivided share of the judgment debtor.

Melville v. Brown, 15 Mass. 82; Beaumont v. Crane, 14 Mass. 400.

‖ Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid, and separate receipts given; it was held that it became a question of fact to be left to the jury, to say whether it was the intention of the parties to enter into a new contract of demise with a separate reservation of rent to each.

Powis v. Smith, 5 Barn. & A. 850.‖

(L) Of the Remedies which Joint-tenants and Tenants in common have against each other.

By the common law joint-tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, for he could not be charged as bailiff or receiver to his companion, unless he actually made him so. But now by the 4 and 5 Ann. c. 16, it is provided, that they and their executors and administrators may have an account

(L) Of the Remedies of Joint-tenants, &c.

(*a*) against the others as bailiffs, for receiving more than comes to their just share or proportion, and against their executors and administrators.

Co. Lit. 172 a, 186 a, 200 b; 3 Leon. 228. So, if two had a ward in common, and one took all the profits. F. N. B. 118. (*a*) ‖ But in such an action upon the statute the plaintiff must state in his declaration that the defendant is tenant in common with him, and that he has received more than his share; for this action on the statute is very different from the action of account against a bailiff at common law; for the bailiff at common law was answerable, not only for his actual receipts, but also for what he might have made of the lands without his wilful default; but the defendant in an action under the statute is answerable only for so much as he has actually received more than his just share and proportion. Wheeler v. Horne, Willes's Rep. 208; Vin. Abr. tit. *Joint-tenants*, (R. a), pl. 4.‖

But, if one joint-tenant or tenant in common had ejected or (*b*) withheld the possession from his companion, such joint-tenant or tenant in common so ejected might have maintained an *ejectione firmæ* against such ejector, &c.*

Co. Lit. 199 b; ß Lessee of White v. Sayre, 2 Ohio, 110. ϑ (*b*) But though one tenant in common may disseise the other, yet it must be by actual disseisin, as turning him out, hindering him to enter, &c.; but a bare perception of profits is not enough. Salk. 392, pl. 4; 7 Mod. 39.—*Confession of lease, entry, and ouster, is sufficient on an ejectment, in the case of a tenant in common, without proof of actual ouster. 3 Burr. 1895. ‖ Where a defendant in ejectment shows by affidavit that he is a coparcener, joint-tenant, or tenant in common, and denies actual ouster, it is a matter of course to permit him to confess lease and entry only, without confessing ouster. Doe v. Roe, 2 Taunt. 397.‖ [And one tenant in common may maintain an action for mesne profits against his companion. Goodtitle v. Tombs, 3 Wils. 1118.]

ß The unity of possession may be destroyed by an actual ouster.
Allen v. Hall, 1 M'Cord, 131. ϑ

Also, one joint-tenant or tenant in common may offend against the statutes against forcible entries, either by forcibly ejecting, or forcibly holding out his companions; for though the entry of such a tenant be lawful *per mie et per tout*, so that he cannot in any case be punished in an action of trespass at the common law; yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and, consequently, an indictment of forcible entry into a moiety of a manor, &c., is good.

Latch. 221; Palm. 419.

But though joint-tenants and tenants in common being actually ejected, had these remedies at common law, yet such remedies were only extended to things real; and there was no remedy where a horse, hawk, &c., were seised by one joint-tenant or tenant in common, but by re-seising it again when a proper opportunity served.

Lit. § 323.

If there be two tenants in common of a manor to which waif and stray belong; a stray doth happen, they are tenants in common of the same; and if the one doth take the stray, the other hath no remedy by action but to take him again; but, if by prescription the one is to have the first beast happening as a stray, and the other the second, there an action lieth, if the one take that which pertains to the other.

Co. Lit. 200 a.

So, if there be two tenants in common of a park or dove-house, and one of them destroy all the deer, or take all the old doves, and destroy the flight; or if two have land and mere-stones in common, and one of them carry them away; or if they have a folding in common, and one disturb the other to erect hurdles, in all these cases trespass *quare vi et armis* lies.

Co. Lit. 200 a, b.

(L) Of the Remedies of Joint-tenants, &c.

If two several owners of houses have a river in common, and one of them corrupt it, the other shall have an action on the case.

Co. Lit. 200 b.

If one be willing to repair a house or mill which he holds in common, or jointly with another, he may have a writ *de domo reparanda* against him.

Co. Lit. 200 b. ℘ When a well is owned by tenants in common, and there is no prescription or agreement binding either party to make the repairs, one cannot maintain an action against the other without a previous request to him to make the requisite repairs. Deane v. Badger, 11 Mass. 65.℘

℘ A tenant for life of a part of a mill agrees that his co-tenant shall repair, and reimburse himself out of the profits of the mill, the profits are not answerable after the death of tenant for life.

Carver v. Miller, 4 Mass. 559.℘

If land be given to two for life, and to the heirs of one of them, and tenant for life do waste, he that hath the fee cannot have an action of waste on the statute of Gloucester, but he may have one on Westm. 2, c. 22, which enacts, that if there be two tenants in common of a wood, turbary, piscary, &c., and one do waste, the other shall have a writ of waste, and the waster shall have election before judgment, either to have his part in certain assigned to him by the oath of twelve men, (and then the place wasted shall be assigned for part thereof,) or to grant that he will take no more for the future than his companion shall approve of; and this act by construction has been held to extend to joint-tenants, but not to parceners, because they might have the writ *de partitione faciendâ* at common law.

Co. Lit. 200 b; 2 Inst. 403.

One tenant in common, [or one joint-tenant, or parcener,] cannot bring trover against his companion, because they are both equally entitled to the possession; the possession of one is the possession of both.

Co. Lit. 200; Brown v. Hedges, 1 Salk. 290. ℘ One tenant in common of chattels cannot maintain trespass against a person who having an execution against the other tenant in common, causes the whole of the property so held to be sold by the sheriff to satisfy the execution; because the purchaser at sheriff's sale acquires no more than the interest of the debtor. Pattengill v. Bartlett, Adams, 87.℘

‖ Where the plaintiff and defendant C were members of a friendly society, who raised a fund by weekly contributions from each other, and the aggregate sum was kept in a box deposited with the plaintiff, who gave a bond for the safe custody of it; and C took away the box and delivered it to the other defendant, who was not a member of the society; on motion to set aside a nonsuit, which had been directed by the judge who tried the cause, it was said by the court, that as all the members had a joint property in the box and its contents, they were therefore tenants in common, and one tenant in common cannot maintain trover against another.

Holliday v. Camsell & White, 1 T. R. 658.

But if one joint-tenant, tenant in common, or parcener, destroy the property in common, the other may bring trover.

Co. Lit. 200.

Therefore where one tenant in common of a ship forcibly took it from the other, secreted it for some time, changed its name, and then sent it to the West Indies, where it sunk and was entirely lost; it was holden by Lord King to be evidence of a destruction by such tenant in common: and the jury, under his directions, found it to be a destruction.

Barnardiston v. Chapman, 4 East, 121; Bull. N. P. 34, S. C. But it seems that the

(L) Of the Remedies of Joint-tenants, &c.

sale of a ship by one, who is only a part-owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the destruction of the subject-matter, mediately or immediately, so as to enable his co-tenant to maintain trover against him for it. Heath v. Hubbard, 4 East, 110. ß One tenant in common may maintain trespass against the other for removing his goods from that part of the premises which was assigned to him by agreement. Keay v. Goodwin, 16 Mass. 1.ϑ

In all cases where one tenant in common *misuses* that which he hath in common with another, he is answerable to the other in an action as for misfeasance.

Per Lord Kenyon, 8 T. R. 146.

But one tenant in common cannot maintain an action in the nature of waste against the other for cutting down trees of a proper age, and proper growth; for this is no injury to the inheritance.

Martin v. Knowllys, 8 T. R. 145.

So, where one of two tenants in common of a whale, cut it up and expressed the oil, this alteration in the form of the property did not amount to a tortious conversion, so as to enable his companion to maintain trover; for the act was an application of the whale to the only purpose which could make it profitable to the owners; and tended to preserve it, instead of destroying it; and as the parties were clearly tenants in common of the whale, they became such of the produce, after it was converted into oil.

Fennings v. Lord Grenville, 1 Taunt. 241.

But, though one tenant in common cannot bring trover against his companion, yet that is only where the law considers the possession of one as the possession of both; and therefore if A be tenant in fee of one-fourth part of the estate, and B tenant in common with him of the other three parts for a term of years, without impeachment of waste, if A cut down any trees, and B take them away, A may maintain trover: for though B being dispunishable of waste, might cut down what trees he would; yet the trees having an inheritable property, and he having no interest in the inheritance, cannot take them when felled by him who has the inheritance; and, consequently, his possession being tortious, cannot be said to be the possession of the other.

West v. Pasmore, *per* Turton, J., Salk. MSS.; Bull. N. P. 35.‖

ß At common law, an action for contribution can be maintained by a tenant in common or joint-tenant, against his co-tenant only, and not against the reversioner.

Carver v. Miller, 4 Mass. 559.

One tenant in common who occupies the whole estate without any claim on the part of his co-tenants to be admitted into possession, and without hinderance by him of such possession, is not liable to his co-tenants in an action of account.

Sargent v. Parsons, 12 Mass. 149. But see Brigham v. Eveleth, 9 Mass. 538, where it is said that *indebitatus assumpsit* lies for one tenant in common against his co-tenant for a share of the profits.

When one joint-tenant voluntarily abandons his possession, the tenant remaining will not be accountable for rent of the entire tract, but only for such portion as has been rendered productive by the labour of the person who abandoned it.

Volentine v. Johnson, 1 Hill, Ch. 49.

One tenant in common or joint-tenant is responsible to his co-tenant for

waste, or for receiving more than his share of the profits of the estate so held.

Nelson v. Clay, 7 J. J. Marsh. 140. But see Brigham v. Eveleth, 9 Mass. 538; Jones v. Haraden, 9 Mass. 540; Sargent v. Parsons, 12 Mass. 149.

One joint-tenant or tenant in common, cannot maintain detinue against his co-tenant for property to which both have title.

1 Monroe, 29. See Carlisle v. Patterson, 3 Bibb, 94.

‖ In ejectment by one tenant in common against another, it is necessary to prove either an actual ouster, or to produce the consent rule, confessing lease, entry, *and ouster.*

Doe v. Cuff, 1 Camp. R. 173.

A demand of possession by one tenant in common, and a refusal by the other, stating that he *claimed the whole*, is evidence of an actual ouster.

Doe v. Bird, 11 East, 49; and see Roe v. Burn, 6 Barn. & C. 289.

A notice by one of several tenants in common to the tenants, to pay their rents to him only, and an advertisement of sale of the estate, do not amount to an *exclusion* of the co-tenants; and therefore the vice-chancellor refused to appoint a receiver. *Quære.* In case of an exclusion, whether the court would appoint a receiver, or whether they would not leave the co-tenant to proceed at law in case of a legal ouster? and if the exclusion did not amount to that, whether the court would do more than make the tenant in common, in receipt of the rents account to his companion.

Tyson v. Fairclough, 2 Sim. & Stu. 142; and see Milbank v. Rivett, 2 Meriv. 405.‖

JOINTURE.

Vide tit. "Dower and Jointure."

JURIES.

The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate, than to be sure of not being devested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighbourhood? and hence we find the common law herein confirmed by *Magna Charta*, c. 29. *Nullus liber homo capiatur, vel imprisonetur, aut disseisictur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur. Nec super eum ibimus, nec super eum mittemus* (*a*) *nisi per legale judicium parium* (*b*) *suorum, vel per legem terræ.*

Fortesc. de Laud. Leg. Ang. c. 25; Co. Lit. 155; Co. Preface to 3d and 8th report.

(*a*) ‖ These words have been differently expounded by different writers. Lord Coke

supposes *ibimus* to signify the process of the court *coram rege*, and *mittemus* that of any court which derives its authority from a writ sent to it. A late writer thinks that their real meaning may be learned from John himself, who the next year after the granting of the charter, promised by his letters-patent *nec super eum per vim vel per arma ibimus, nisi per legem regni nostri, vel per judicium parium suorum in curiâ nostrâ.* Pat. 16 Johan. apud Brad. ii. App. No. 124. John had hitherto, he says, been in the habit of going with an armed force, or sending an armed force, on the lands and against the castles of all whom he knew or suspected to be his secret enemies, without observing any form of law; and he instances particularly his arrest of the relatives of Langton and the bishops his associates, whom he had despoiled of their goods and thrown into prison, though they had not been guilty of any offence. Ling. Hist. Eng. vol. ii. 255, n. 75. But the meaning of these words, in this place, seems to be fully and more simply explained by their technical sense in the civil law. IRE *in bona alicujus dicuntur, qui in rerum possessionem a magistratu* MITTUNTUR. Calv. Lex. Jur. *Ire.* As the former expressions in this chapter apply to the *person* and the *freehold*, it seemed natural to add such as might protect the *goods and chattels.* 1 Reeve's H. L. 249, n. (b) (*b*) These words, *judicium parium*, have no reference to a jury; they apply only to the *pares regni*, who were the constitutional judges in the Court of Exchequer and *coram Rege.* The trial by jury was never spoken of in these days as *judicium*, much less as *judicium parium.* We hear of *veredictum, juramentum legalium hominum, jurata vicineti*, and the like, all expressive of some *sworn truth*, or of the person who swore it, coming from the *vicinage;* whereas the *pares regni* gave judgment, and *not upon oath;* and so did the *sectatores* in the county and other courts, who were the *pares* to all *liberi homines de comitatu;* and these latter came from the body of the county, and not from the vicinage. 1 Reeves's H. L. *ubi supra.*‖

Likewise the antiquity of this trial, and its being peculiar to us, have been taken notice of, as matters which reflect honour on our constitution; for though there were anciently several other methods of trial, such as by battle, ordeal, &c., yet have they, from the inconveniences attending them, been laid aside, and this alone cultivated and improved, as the best method of investigating truth.

Spelm. Gloss. verbo *Jurata;* Glan. lib. 2, c. 7. For the origin of the trial by jury, see Hickes, Thes. Lingu. Septentr. Diss. Epist. § 9, p. 38, 39, 40. ℘ It will perhaps surprise some readers to learn that the origin of trials *per pais*, according to a modern writer, is French. "*En remontant à l'ordre judiciaire des Grecs et des Romains, ainsi qu'aux institutions du peuple du Nord, on y découvre des germes de cette juridiction, appliquée aux contestations civiles; mais, de toutes les nations modernes, la France peut revendiquer l'honneur d'avoir la première consacré le* jugement d'un accusé *par ses pairs* (pares.) *Cette institution, encore bien imparfaite* [*fut*] *transportée en Angleterre lors de la conquête de ce païs par les Normans.*" Morin, Dict. du Droit Criminel, voce *Jurés, Jury.*℘

We shall consider this head under the following divisions:—

(A) Of the several Kinds of Juries and Inquests: And herein, of the Number such Juries must consist of.

(B) Of the Jury Process, and Manner of convening the Jury: And herein,

1. *Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.*
2. *Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear.*
3. *By whom such Processes are to be executed, and the Jury convened.*
4. *In what Time such Processes are returnable.*
5. *Where the Jury must appear.*
6. *What Number are to be returned.*
7. *Of awarding Process by* Proviso.
8. *Necessity of returning a Panel into Court, and where a Prisoner may demand a Copy of it.*
9. *Of the Trials going off* pro Defectu Juratorum; *and therein of drawing a Juror*

(C) In what Cases, and in what Manner a *Tales* is grantable.

(A) Of the several Kinds of Juries and Inquests.

(D) In what Cases, and in what Manner Special Juries are appointed.

(E) Who are to be returned: And herein, of the Qualifications and several Causes for which they may be challenged; and,

1. *Of Challenges to the Array or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Favour.*
2. *Where Insufficiency and not being* Liber Homo *is a good Cause of Challenge to the Polls.*
3. *Where the Want of Freehold, or a competent Estate, is a good Cause of Challenge.*
4. *Where the Jury's not being convened from a right Place is a good Cause of Challenge.*
5. *Where Partiality in the Juror is a good Cause of Challenge; and therein where it shall be said a principal Cause of Challenge, or to the Favour.*
6. *Where the Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.*
7. *Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.*
8. *Of Trials* per Medietatem Linguæ, *where an Alien is Party.*
9. *Of peremptory Challenges.*
10. *Of Challenges by the Crown.*
11. *At what Time a Challenge is to be taken.*
12. *How such a Challenge is to be tried.*

(F) How Jurors are to be empannelled and sworn.

(G) How to be kept and discharged.

(H) In what Cases, and in what Manner to have a View.

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable, and aided after Verdict.

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors are aided by Consent.

(L) When, and by whom to be paid.

(M) For what Misdemeanors punishable: And herein,

1. *Where punishable by Attaint.*
2. *How otherwise punishable.*
3. *Where Abuses by others in relation to them are punishable; and therein of the Offence of Embracery.*

(A) Of the several Kinds of Juries and Inquests: And herein of the Number such Jury must consist of.

Juries are distinguished into grand and petit juries. The grand jury may (*a*) consist of thirteen, or any greater number [not exceeding twenty-three;] for these being the grand inquisitors of the county, every indictment and presentment by them must be found by twelve at least; but it is not necessary that all above that number should concur in such presentment or indictment.

Cro. Eliz. 654; 3 Inst. 30; 2 Inst. 387; 2 Hal. Hist. P. C. 154; 2 Burr. 1088

(*a*) In Middlesex three grand juries are returned every term to serve in B. R., every jury consisting of sixteen, seventeen, or more, to inquire of offences criminal committed in the several parts of the county of Middlesex through the whole county. The reason hereof is, that in Middlesex there are three hundreds, and for every several hundred there is a particular jury returned to serve for that hundred only. 2 Lil. Reg. 156.—In some counties which consist of guildable, and such franchise, where anciently several justices of jail-delivery sat, as in Suffolk, there are two grand juries, one for the guildable, another for the franchise, because there are two several commissions of jail-de-

(A) Of the several Kinds of Juries and Inquests.

.ivery. 2 Hal. Hist. P. C. 26, 154. ℔The correct number of grand jurors cannot exceed twenty-three. R. v. Marsh. 1 N. & P. 187.℈

Upon the summons of any session of the peace, and in cases of commissions of oyer and terminer and jail-delivery, there goes out a precept either in the name of the king, or of two or more justices, directed to the sheriff, upon which he is to return twenty-four, or more, out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, oyer and terminer or jail-delivery, are taken, and sworn *ad inquirendum pro domino rege et corpore comitatûs.*

2 Hal. Hist. P. C. 154.

Those returned to serve on the grand jury must be (*a*) *probi et legales homines*, and ought to be of the same county where the crime was committed; and therefore it is a good exception at common law to one returned on a grand jury, that he is an alien or villein, or that he is (*b*) outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor; but these exceptions must be taken before the indictment found.

Cro. Eliz. 654; 3 Inst. 30; 12 Co. 99; 2 Roll. Rep. 82; 2 Hal. Hist. P. C. 154, 155. (*a*) Where indictments found in inferior courts have been quashed for want of the words *proborum et legalium hominum* in the caption. Cro. Eliz. 751; Cro. Ja. 635; Palm. 282; 2 Roll. Rep. 400; 2 Roll. Abr. 82; Poph. 202; Keb. 629; 2 Keb. 471; 3 Mod. 122; Lev. 208. ℔It is sufficient that the caption of an indictment states that the grand jurors were "good and lawful men." Cornwell v. The State, Martin & Yer. 147.℈—But this exception has been often overruled, because *primâ facie* all men shall be intended honest and lawful. Keb. 50; 2 Keb. 135, 284; Cro. Ja. 41; Sid. 106, 367. ℔It is not requisite that it should appear on the record that the jurors holding the inquest were qualified to serve. Gay v. Caldwell, Hardin, 63.℈ (*b*) Or in a personal action. 2 Hal. Hist. P. C. 155. But for this vide 3 Inst. 32; 21 H. 6, 30, pl. 17; Fitz. tit. *Process*, 208; Cro. Car. 134, 147; Jones, 198; 12 Co. 99.

It is laid down by my Lord Chief Justice Hale, that at common law every person returned on the grand jury ought to be a freeholder (*c*) at least, and that the statute of 2 H. 5, c. 3, that requires jurors that pass upon the trial of a man's life to have 40*s.* per annum freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions.

2 Hal. Hist. P. C. 155. But for this vide 2 Hawk. P. C. c. 25, § 19. [To what amount the qualification should be, is uncertain, and seems to be *casus omissus*, and proper to be supplied by the legislature. 4 Bl. Com. 302.] (*c*) ‖ In a case reserved by Mr. Justice Lawrence, from the Oxford circuit in 1810, the judges held that grand jurors are not positively required to be freeholders. 3 Chetw. Burn's Justice, 81. See Lamb. 382.‖

Also, by several acts of parliament it is provided that those who serve on the grand jury be such as are duly qualified; the principal of which acts are the 11 H. 4, c. 9, and 3 H. 8, c. 12, the first whereof is as followeth: "Because that now of the late inquests were taken at Westminster of persons named to the justices, without due return of the sheriff, of which persons some were outlawed before the said justices of record, and some fled to sanctuary for treason, and some for felony, there to have refuge, by whom as well many offenders were indicted, as other lawful liege people of our lord the king, not guilty, by conspiracy, abettment, and false imagination of other persons, for their special advantage and singular lucre, against the course of the common law used and accustomed before this time; our said the lord the king, for the greater ease and quietness of his people, willeth and

granteth, that the same indictment so made, with all the dependence thereof, be revoked, annulled, void, and holden for none for ever; and that from henceforth no indictment be made by any such persons, but by inquests of the king's lawful liege people, in the manner as was used in the time of his noble progenitors, returned by the sheriffs or bailiffs of franchises, without any denomination to the sheriffs or bailiffs of franchises before made by any person of the names which by him should be empannelled, except it be by the officers of the said sheriffs or bailiffs of franchises sworn and known to make the same, and other officers to whom it pertaineth to make the same, according to the law of England; and if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden for none."

‖ It is worthy of remark, that notwithstanding the many alterations made in the qualifications of jurors in subsequent times, and the solicitude shown to choose them from among those who were thought from their rank and character to be above temptations to corruption, nothing further was provided after this statute respecting those jurors who found indictments; 3 Reeves's Hist. 241. The legislature seems to have considered the vesting of a discretionary power in the justices of reforming the panels, which we shall hereafter notice, as sufficient to secure a respectable jury.‖

In the construction of this statute the following points have been resolved:—

That if a person not returned on a grand jury procure his name to be read among those that are returned, whereupon he is sworn, &c., he may be indicted for a contempt of this statute.

12 Co. 99; 3 Inst. 33.

That indictments before (*a*) justices of the peace are clearly within this statute.

12 Co. 99; 3 Inst. 33; Cro. Car. 134. (*a*) It seems that a coroner's inquest is within it. Jones, 198.

That a person, arraigned on an indictment taken contrary to the statute, may plead such matter in avoidance of the indictment, and also plead over to the felony.

3 Inst. 34; Cro. Car. 134; Jones, 198. ℔ When a person is under prosecution for a crime about to be submitted to a jury, he has a right, previous to being indicted, to challenge the grand jurors. Hudson v. The State, 1 Blackf. 318; Ross v. The State, 1 Blackf. 390. ℭ

That he, who is outlawed on an indictment without any trial, may clearly show in avoidance of such outlawry, that the indictment was taken contrary to the statute. But the court need not admit of the plea of the outlawry of an indictor in avoidance of any such indictment, unless he who pleads it have the record ready; unless it be an outlawry of the same court wherein the indictment is depending; in which case it is said, that any one as *amicus curiæ* may inform the court of it. Also, it seems the better opinion, that no exception against an indictor is allowable, unless the party takes it before trial.

3 Inst. 34; Cro. Car. 147.

That if one of the grand jury, who find an indictment, be within any of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it.

11 H. 4, 41, pl. 8; Fitzh. Coron. pl. 89; 2 Hawk. P. C. c. 25, § 28. ℔ Objections to the personal qualifications of the grand jurors must be made before the indictments are found. These objections may be made by any one who is under presentment, or who may make the suggestion as *amicus curiæ*. Commonwealth v. Smith, 9 Mass. 107. ℭ

That if a prisoner indicted of felony offer to take any such exception, he shall, upon his prayer, have counsel assigned him for his assistance.

3 Inst. 33; Cro. Car. 134, 147; Jones, 198; Ley, 81.

By the 3 H. 8, c. 12, it is enacted, "That all panels to be returned, which be not at the suit of any party, that shall be made, and put in by every sheriff and their ministers, before any justice of jail-delivery, or justices of peace, whereof one to be of the *quorum*, in their open sessions, to inquire for the king, shall be reformed by putting to and taking out of the names of the persons which so be empannelled by every sheriff, and their ministers, by discretion of the same justices before whom such panels shall be returned, and that the same justice and justices shall command every sheriff, and their ministers in his absence, to put other persons in the same panel by their discretions, and that the same panels so reformed by the said justices be good and lawful; and that if any sheriff, or any their minister, at any time do not return the same panels so reformed, that then every such sheriff or minister so offending, for every such offence shall forfeit twenty pounds sterling money of England; ‖the one half thereof to our sovereign lord the king or his heirs, and the other half to him or them of his subjects that will sue for the same by action of debt at the common law, or bill, or plaint, where it shall fortune any such to fall and be; and that ne essoin, ne protection be allowed for the defendant or defendants in that action or plaint, nor that the said defendant or defendants therein be permitted to wage their law; and that the king's pardon shall be no bar against the party and parties in the same, that any such action shall sue."‖

‖ This act originally formed part of an act passed in 11th of H. 7, the main object of which was to direct a new course of proceeding in attaints, and to substitute a pecuniary mulct instead of the opprobrious judgment of the common law. Being intended only as an experiment, it was merely temporary, and, after several continuances, was suffered to expire in the second parliament of King Henry 8. It was not till the 23 H. 8, that it was revived; but that part of it which authorized the court to reform the panel was immediately re-enacted in this separate act. This vast change in the course of criminal prosecutions, which subjected the whole panel to the discretionary power of the justices, and abrogated, so far as their acts extended, the salutary provisions of 11 H. 4, c. 9, seems to have escaped the animadversion, and even the notice, of any of our historians. Possibly, men's minds were in some degree prepared for it by an exercise of this power by the justices over the panel, in civil suits, so far back as the time of E. 3. Brooke (Jurors, 31) refers to a case (41 E. 3, 26) which I have not been able to find in the Year-Book, where, upon a false return made by the bailiff of a franchise, the justices reformed the panel. This use of the word "reform" seems borrowed from the sense it bears in the French army:—"*On appelle* reforme, *le congé qu'un inspecteur donne à un ou plusieurs soldats, cavaliers, ou dragons, en faisant sa revue, parce qu'ils ne sont pas convenables pour faire le service.*"‖

This act extends not only to panels of grand inquests returned, but also to panels of the petit jury, commonly called the jury of life and death, which may be reformed by the justices according to this act, and the sheriff is bound to return the panel so reformed.

2 Hal. Hist. P. C. 156, 265.

It hath been holden, that this statute doth not take away the force of 11 H. 4, c. 9, as to any point wherein both may consist together; and therefore if any indictor be outlawed, or returned at the nomination of any person, contrary to 11 H. 4, c. 9, except of the justices authorized as above mentioned to reform the panel, the indictment may be avoided in the same manner as before.

3 Inst. 33; 2 Hawk. P. C. c. 25, § 33; *contra*, S. P. C. 88.

(B) Of the Jury Process, and Manner of convening.

The grand jury, as has been already observed, must consist of twelve at(*a*) least, the petit jury of twelve, and can be neither more nor less; but it is said, that particular(*b*) inquests may consist of a more or less(*c*) number than twelve.

Trials per Pais, 93; F. N. B. 107; Finch of Law, 400, 484.—A writ of inquiry of waste by thirteen was holden good. Cro. Car. 414. ℔ A cause cannot be tried by eleven jurors. Briant v. Russell, 1 Penning. 146; Den v. Baldwin, 2 Penning. 945; Mitten v. Snook, 2 Penning. 911. Nor by thirteen. Whitehurst v. Davis, 2 Hayw. 113. But the objection must be made in the court below. Ross v. Neal, 7 Monroe, 408.℣ (*a*) To make a jury in a writ of right, which is called the grand assize, there must be sixteen; viz. four knights, and twelve others. Trials per Pais, 95. Or it may consist of a greater number. 2 Roll. Abr. 674.—The jury in attaint, called the grand jury, must be twenty-four; but if the issue be upon a matter out of the point of the attaint, as upon a plea of non-tenure, the trial shall be by twelve. Trials per Pais, 95. (*b*) A juror can be excepted against on an inquest of office. 6 Mod. 43.——A jury cannot be attainted on an inquest of office. Carth. 362. (*c*) ‖ According to Lord Somers, the grand jury were never less than *thirteen*; twelve of whom must concur in every indictment, else it is no legal verdict.‖

But on a writ of error a judgment out of an inferior court was reversed, because being by default the inquiry of damages was only by two jurors; and though a custom was alleged to warrant it, yet it was resolved that there could not be less than twelve, though the writ of inquiry saith only *per sacramentum proborum et legalium hominum*, and not *duodecim*, as in a *venire*.

Vent. 113.

Also, it hath been frequently holden, that a custom in an inferior court to try by six jurors is void; and that though such custom is used in Wales, yet that that is by force of the statute 34 & 35 H. 8, c. 26, § 74, which appoints that such trials may be by six only where the custom hath been so.(*d*)

Cro. Car. 259; Sid. 233; 3 Keb. 326. (*d*) See Cro. Car. 259; 1 Sid. 233, and 3 G. 2, c. 25, § 9.

(B) Of the Jury Process, and Manner of convening the Jury: And herein,

1. *Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.*

It seems agreed, that a person not duly summoned and returned is not obliged to serve on a jury; as it hath been holden, that if a stranger cause himself to be sworn in the name of one who was of the jury, it is such a misdemeanor for which he may be indicted, and for which also an action on the case lies at the suit of the party injured.

March. 81. ℔ A was chosen a juror, and his name put into the box and drawn from it, but by mistake of the sheriff, B was summoned, and the mistake being discovered, B was dismissed and A summoned; held, that A was a competent juror. Colt v. Eves, 12 Conn. 243.℣

But justices of jail-delivery may have a panel returned by the sheriff without any precept or writ; and the reason given for it is, that before their coming they may make a general precept to the sheriff in parchment, under their seals, to bring before them at the day of their sessions twenty-four out of every hundred, &c., to do those things which shall be enjoined them on the part of the king, &c., and therefore it is said, that they need not make any other precept for the return of a jury for the trial of any issue joined before them, but that their bare award that the jury shall come is sufficient, because there are enough for that purpose supposed to be present in court, whom

the sheriff may return immediately, whenever the court shall demand their service.

2 Inst. 568; 4 Inst. 168; 2 Hawk. P. C. c. 41, § 1. ℔ Where the constable had omitted to insert the name of the juror in his return, the juror was put upon the panel on his making oath that he had been summoned. Patterson's case, 6 Mass. 486. See Anon. 1 Pick. 196. ℭ

Also, it is said, that a jury may be so returned before justices of peace at their sessions, because the precept for the summons of the sessions hath a clause to the same effect, for the summons of twenty-four out of every hundred: but it is (*a*) doubted whether this matter does not rather depend on practice, and the constant course of precedents, than any argument from the reason of the thing; and even in the case of justices of jail-delivery, the law is otherwise, if they have a special commission.

2 Inst. 568; Sid. 364. (*a*) 2 Hawk. P. C. c. 41, § 1.

Also, the precept to the sheriff from justices of oyer and terminer, in order for the holding of their sessions, hath in effect the very same clause for the bringing of twenty-four before them out of each hundred at the day of their sessions, &c., and yet it seems agreed, that they cannot have a jury returned for the trial of an issue joined before them by force of a bare award, but ought to make a particular precept to the sheriff for that purpose under their seals.

2 Hal. Hist. P. C. 260, 261; 2 Hawk. P. C. c. 41, § 1.

By the course of the King's Bench no jury can be returned into it from a foreign county, without process under the seal of the chief-justice. But *quære* if it may not be returned for a trial in the county where it sits by a bare *præceptum est*?

Dyer, 118; 2 Hal. Hist. 260; 2 Hawk. P. C. c. 41, § 2.

2. *Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear.*

The first process for convening the jury is the *venire facias*, which must be awarded on the roll, and thereupon in the Common Pleas, there issue the *habeas corpora* and *distringas juratores;* but in the King's Bench and Exchequer after the *venire* they proceed on the *distringas;* for the *venire* being in the nature of a summons, if the jury do not appear thereon in those courts in which the king has a more immediate concern, they proceed on the strongest process, viz.: the *distringas*.

Trials per Pais, 64. ℔ A venire for a petit jury should not contain a panel for a grand jury also; as they are distinct bodies, they should be separately summoned. Forsythe v. The State of Ohio, 6 Ohio, 20. ℭ

If all the jury did not attend on the *habeas corpora* or *distringas*, which was to bring them into court, there was an *undecim*, *decem*, or *octo tales*, according as the number was deficient, to force others to the King's Court to try the issue; this was without (*b*) a new summons or *venire*, because it was supposed that the first *habeas corpora* and *distringas* had given notice to the vicinity that they ought to appear; and therefore the supplement of a jury were forced in without a particular summons to them.

(*b*) But, if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *distringas juratores* shall issue, and no *tales*. 2 Hal. Hist. P. C. 265.

There must be an award on the roll to warrant the issuing of the *venire* or *distringas*, and such process must be continued from time to time against

the jurors, returnable on the same days to which the suit is continued on the roll against the parties.

2 Hawk. P. C. c. 27, § 90.

And therefore where a *venire facias* was made returnable on the 23d of January, and the *distringas* tested on the 24th, this was holden a discontinuance, and being in a criminal case, not aided by any of the statutes of *jeofails*.

6 Mod. 281; Salk. 51; 2 Ld. Raym. 1061.

So, where the *venire* omits part of the issue or issues to be tried, or where a *venire* omits any of the parties, these are discontinuances.

2 Hawk. P. C. c. 27, § 97, 98; Cro. Eliz. 622; Roll. Rep. 22; 3 Buls. 311; Winch. 73.

So, where a juror is named in the *habeas corpora* by a name different from that in the panel returned on the *venire*, or where a juror returned on such a panel is wholly omitted in the *habeas corpora*. But in these cases, if the juror so misnamed or omitted be not sworn at the trial of the cause, it is questionable whether there be any discontinuance at all.

2 Hawk. P. C. c. 27, § 99; Sid. 66; Keb. 182, 191, 198, 215; 6 Mod. 285; 5 Co. 36 b; Cro. Eliz. 586. Vide *postea*, letter (I).

Where there are several defendants who plead several pleas, the plaintiff may choose either to have one *venire facias* for all, or several for (*a*) every one of the defendants: so, where several persons are arraigned upon the same indictment or appeal, and severally plead not guilty, it is in the election of the prosecutor either to take out a joint *venire* against them all, or several against each of them; but, in an appeal, if one plead not guilty, and the other plead a release made at A, it seems that there must be several *venires*.

Jones, 425; 2 Hawk. P. C. c. 41, § 8. (*a*) It is said, that where there are three defendants, the plaintiff may join two of them in one *venire*, and take out another against the third. Cro. Eliz. 541. But for this vide 2 Roll. Abr. 596, 620, 667; Hob. 36; Cro. Eliz. 866; Cro. Ja. 550.

But where a joint *venire* is first awarded for the trial of all the defendants together, and afterwards several *venires* for the trial of each of them, this is a discontinuance.

2 Hawk. P. C. c. 27, § 96.

And where the same jury is returned on joint process against several defendants, if a juror be challenged by any one of them, and the challenge allowed, and the juror thereupon drawn, he is by necessary consequence drawn as to all, because there being but one panel, the same person cannot at the same time be taken from it, and continue in it; and to prevent this inconvenience, where one jury is jointly returned for the trial of several defendants before justices of jail-delivery, they may sever the panel; but after an appellant has taken out a joint *venire* against all the appellees, he cannot afterwards take out several ones, though the first be never returned, because it would amount to a discontinuance.

2 Hawk. P. C. c. 41, § 9, and several authorities there cited.

Jurors being duly served with process are compellable to appear; and therefore, where more than one appear, but not enough to take the inquest, but some of the others come within view, or into the town where the court is holden, but refuse to come into court; in these cases the court may order those who appear to inquire of the yearly value of such defaulters' lands;

which being done, the court may either summon them to appear, on pain of the sum found, or some less sum, or may fine them in like sum without more ado. But such juror shall be liable to lose his issues only for such default, and not the yearly value of his lands, unless the party pray it. But a juror who makes default after appearance is liable to such forfeiture without any prayer; yet the court in discretion will sometimes only impose a small fine: also, a juror, who comes not to the town where the court is holden, shall only lose his issues, or be amerced, but not fined. And it is said, that a juror is not amerceable at all at the return of the first *venire*, except before justices of *oyer* and *terminer*.

2 Hawk. P. C. c. 22, § 14, and several authorities there cited. Trials per Pais, 200.

Also, by the 27 Eliz. c. 6, § 2, it is enacted, "That upon every first writ of *habeas corpora* or *distringas* with a *nisi prius* delivered of record to the sheriff, or other minister or ministers to whom the making of the return shall appertain, shall return in issues, upon every person empannelled and returned upon any such writ, at the least ten shillings; and at the second writ of *habeas corpora* or *distringas* with a *nisi prius* upon every person empannelled and returned upon any such writ twenty shillings at the least; and that the third writ of *habeas corpora* or *distringas* with a *nisi prius*, that shall be further awarded, upon every person empannelled and returned upon such writ thirty shillings; and upon every writ that shall be further awarded to try any such issues, to double the issues last afore specified, until a full jury be sworn, or the process otherwise ceased or determined, upon pain to forfeit for every return of issues contrary to the form aforesaid five pounds."

And now by 3 G. 2, c. 25, § 13, it is enacted, "That every person or persons whose name or names shall be drawn, (as by the act is directed,) and who shall not appear after being openly called three times, upon oath made by some credible person, that such person so making default had been lawfully summoned, shall forfeit and pay for every default in not appearing upon call as aforesaid, (unless some reasonable cause of his absence be proved by oath or affidavit, to the satisfaction of the judge who sits to try the said cause) such fine or fines not exceeding the sum of five pounds, and not less than forty shillings, as the said judge shall think reasonable to inflict or assess for such default."

‖ By 29 G. 2, c. 19, it is enacted, "That every person duly empannelled and summoned to serve upon any jury for the trial of any cause to be tried in any court of record, holden or to be holden within the city of London, or in any other city or town corporate, liberties or franchises, within the kingdom of England, who shall not appear and serve on such jury after being openly called three times, (and on proof being made on oath of the person so making default having been duly summoned,) shall forfeit and pay for every such his default such fine, not exceeding the sum of forty shillings, nor less than the sum of twenty shillings, as the judge or judges of the respective courts wherein any such default shall be made, shall from time to time deem reasonable to impose or set, unless some just cause for such defaulter's absence shall be made appear by oath or affidavit, to the satisfaction of the judge or judges of the said respective courts wherein any such default shall from time to time be made."‖

‖ The 27 Eliz. c. 6, § 12, the 3 G. 2, c. 25, § 13, and 29 G. 2, c. 19, cited under this head, are all repealed by the 6 G. 4, c. 50; and by § 38, of that act, the fine to be imposed on the juror making default is left entirely to the discretion of the judge; provided that where any *viewer* makes default, the

court is *required* to set upon such viewer (unless reasonable excuse proved) a fine of 10*l.* at the least, and as much more as the court shall think proper.

A precept to the sheriff under the 23 Hen. 8, c. 5, § 3, to summon a jury, must direct him to summon *de corpore comitatus;* a direction to summon from a particular district within the county is bad.

Birkett v. Crozier, 1 Moo. & M. 119. ‖

3. *By whom such Processes are to be executed, and the Jury convened.*

The sheriff is the proper officer by whom the jury process is to be executed, unless he be partial, that is, such a one, as from his consanguinity or affinity, his being under the power of either party, &c., cannot be presumed to be an indifferent person, as every officer who hath any way to do with the administration of justice ought to be; and in every such case the process shall be directed to the coroners, if they are impartial, or to those of them who are so, in case some of them lie under the aforementioned prejudices; and in case all the coroners are partial, or not indifferent, then the *venire* shall be directed to two elizors (*a*) named by the court, against whom, for that reason, no challenge can be taken.

Co. Lit. 158 a; Bro. *Challenge*, 153, *vide infra*, letter (E). ‖ It was settled in Sir Peter Delme's case, and has always been the course of the court, that when either party will suggest any special matter about awarding the *venire* out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider of it, before you enter a *nient dedire*. *Per Cur.* Brocas v. City of London, 1 Str. 235. (*a*) The course of proceeding in the Court of Common Pleas to procure the nomination of elizors, is, first to move the court for a rule to show cause why it should not be referred to one of the prothonotaries to consider of two fit persons to be elizors, and to report; which rule being made absolute, and the prothonotary having named two persons, another rule is moved for to show cause why the persons so named should not be appointed elizors by the court; and upon that rule being made absolute, they are appointed by the court. Holland v. Heron, Barnes, 465.‖

When process is once awarded to the coroners, &c., for the sheriff's actual partiality, the entry is *vicecomes se non intromittat*, and in such case process shall not afterwards be awarded to any new sheriff: but, where it was awarded to the coroners, for that the sheriff is tenant, &c., it may be awarded to a new sheriff.

Co. Lit. 158; 2 Roll. Abr. 670.

So, if a *venire facias* is awarded to the coroner for partiality in the sheriff, and afterwards a *tales* is awarded, which is returned by the sheriff, this has been holden error.

Cro. Eliz. 574, Morgan v. Wye; and vide Cro. Eliz. 586.

But, if the *venire* be awarded to the coroners for default in the sheriff, and they do nothing upon the writ; then upon a default discovered in the coroner *de puisne temps*, the party may show this to the court, and have a *venire* awarded to the sheriff, (if there be an indifferent one made in the meantime,) else to elizors; *et sic e converso.*

Trials per Pais, 53.

And therefore in error of a judgment in Chester, the parties being at issue, a *venire* was awarded to the sheriff, and at the day of the return it was entered, *quod vicecomes non misit breve*, and then the plaintiff prayed a *venire facias* to the coroners for cosinage betwixt him and the sheriff, which was awarded accordingly; and at the day of trial the defendant made default, and thereupon judgment; it was assigned for error, that after the plaintiff had admitted the sheriff to execute the writ, he could not pray a

venire facias to the coroners without some cause *de puisne temps; sed non allocatur*, because there was nothing done upon the first writ, and the defendant having made default, it is not now material.

Percival Willoughby v. Egerton, Cro. Eliz. 853.

Upon the surmise of the plaintiff that the sheriff is his cousin,(*a*) and upon prayer that the *venire* be directed to the coroners for avoidance of his own delay, that might happen by the challenge of the array, the defendant shall be examined whether it be true or not; and if he confess it, then the *venire* shall be awarded to the coroners; for then it appears to the court by the defendan'ts confession, that the sheriff is not indifferent. But, if the defendant denies it, then the process shall be awarded to the sheriff, and the defendant shall not afterwards challenge the array for this cause. But, if the defendant will allege any such matter, and pray a *venire facias* to the coroners, there the plaintiff shall not be examined, neither shall such allegations be allowed; because delays are for the defendant's advantage, and the defendant may challenge the jury for this cause, and so is at no prejudice.

Co. Lit. 157 b, 158 a; Trials per Pais, 55; Jenk. 115. (*a*) [But such a surmise with respect to the under-sheriff will not authorize the awarding of the *venire* to the coroners. Cro. Ja. 547, Symonds v. Walsh. But see 2 Lill. Pr. Reg. 155.]

If there be two sheriffs of a county, and one of them be partial, the *venire* may be directed to the other, and not to the coroners; for the coroner is not the proper person to execute the process of the court, but in such cases where the proper officer is wanting; which cannot be said where there is one impartial sheriff.

Carth. 214, The King v. Warrington, one of the sheriffs of Chester, 1 Salk. 152; S. C., 1 Show. 352; 4 Mod. 65, S. C.; Comb. 191, S. C.; 12 Mod. 22, S. C.; Skin. 104, S. P., adjudged between Rich, sheriff of London, and Sir Thomas Player; 2 Show. 262, 286, S. C. ‖ In the case of the King v. Pierce, Arragosey, and Simpson, for robbing Mr. Kitchen, one of the sheriffs of London, the grand and petit juries were returned by the sheriffs, one of whom was the prosecutor. This was objected to, and Blackstone, J., Eyre, Baron, and Glynn, recorder, discharged the juries, and ordered others to be returned by the coroner. O. B. Sept. Sess. 1778, MS. The note does not state whether the offence was committed in London or in Middlesex.‖

So, if the array be quashed because made by the sheriff's minister, who was aiding and of counsel with one of the parties; yet the writ shall not be directed to the coroners, but to the sheriff, with this proviso, *quod sub-vicecomes tuus in nullo se intromittat cum executione istius brevis.*

Trials per Pais, 51.

After a challenge to the array, and allowed for the partiality of the sheriff, the coroner may return the very same jury.

Fitz. tit. *Challenge*, 121.

If the sheriff return on the *venire facias*, *quod breve istud sic executum et indorsatum per A B nuper vicecomitem prædecessorem suum cum panello, ubi in facto panellum illud factum et arraiatum fuit per ipsum nunc vice-comitem*, the party may challenge the array afterwards for consanguinity or affinity of the sheriff; and this shall be tried by two triers, notwithstanding this false return.

Dyer, 177 b, pl. 34.

Upon a surmise the *venire facias* was awarded to the coroners, and the *venire* was returned by two coroners only, and the *distringas* by three coroners; and there being at the time of the award and return of the *venire*

facias and *distringas* four coroners, it was agreed that this was at common law plain error; for that coroners as ministers must all join, but as judges they may divide; but that it was aided by the statute of *jeofails*, which cures the imperfect and insufficient returns of process by sheriffs or other officers.

Lambe v. Wiseman, Hob. 70; Cr. Ja. 383, S. C. ‖ But according to this report, it was holden by all the justices of the Common Bench and barons of the Exchequer, except Warberton, not to be error; because it ought to have been taken by way of challenge at the time of trial; and forasmuch as the party hath not challenged it, he shall not now assign it for error: but that admitting it were error assignable at the common law, yet now being after verdict, it is aided by the statute, which aids mis-returns, and insufficient returns, and this is but a mis-return.‖

If upon a suggestion on the roll the *venire* is directed to the coroners, who are two in number, and both the coroners are mentioned on the record to have returned the panel, and in reality one only returned it; yet this cannot be excepted against, because an objection contrary to what appears on the face of the record.

Raym. 484, Dominus Rex v. Higgins.

Error of a judgment in Northampton, because in Northampton the court being holden before the mayor and two bailiffs, the *venire facias* upon the issue was awarded to the two bailiffs to return a jury before the mayor and bailiffs *secundum consuetudinem*, which being returned, and judgment given, the error assigned was, because the bailiffs being judges of the court, could not also be officers, to whom process should be directed, there being no custom that can maintain any to be both officer and judge. But all the court (*absente* Hide) conceived it might be good by custom, and that it is not any error; for the judges be not the bailiffs only, but the mayor and bailiffs; and it is a common course in many of the ancient corporations where the bailiffs are judges, or the mayor and they be judges, yet in respect of executing process they be the officers also; and one may be judge and officer *diversis respectibus;* as in re-disseisin, the sheriff is judge and officer; whereupon the judgment was affirmed.

Cro. Car. 138, Crane v. Holland.

If the array of a panel is returned by a bailiff of a franchise, and the sheriff return it as of himself, this shall be quashed. But, if the sheriff return a jury within a liberty, this is good, and the lord of the franchise is driven to his remedy against him.

Co. Lit. 156 a.

If the sheriff returns a panel of jurors, struck by two strangers, that favour neither of the parties, this is a good array, and shall not be quashed; and, therefore, it is common for the officers of the court, by the direction of the judges, to give a panel to the sheriff, which he returns. But the court seems not to have power to compel the sheriff to make his return, but they can fine him, if a sufficient jury does not appear according to the precept of the writ.

Co. Lit. 156 a; Keb. 357, 687.

By the 3 Geo. 2, c. 25, made perpetual by 6 Geo. 2, c. 37, "Reciting that many evil practices had been used in corrupting of jurors returned for the trial of issues joined to be tried before the justices of assize, or *nisi prius*, and the judges of the great sessions in Wales, and the judge or judges of the sessions for the counties palatine of Lancaster, Chester, or Durham, and many neglects or abuses had happened in making up the lists of freeholders, who ought to serve on such trials, and many persons being lawfully sum-

moned to serve on juries had neglected to appear, to the great injury of many persons in their properties and estate; in order to prevent the like practices, neglects, and abuses, it is enacted, that the person or persons required by a statute made in the seventh and eighth years of the reign of his late majesty King William the Third, intituled, 'An Act for the Ease of Jurors, and better regulating of juries;' and by a clause in another act, made in the third and fourth years of the reign of the late Queen Anne, intituled, 'An Act for making perpetual an act for the more easy recovery of small tithes; and also an act for the more easy obtaining partition of lands in coparcenary, joint-tenancy, and tenancy in common; and also for making more effectual and amending several acts relating to the return of jurors;' to give in, or who are by virtue of this act to make up true lists in writing of the names of persons qualified to serve on juries, in order to assist them to complete such lists, pursuant to the intent of the said act, shall (upon request by him or them made to any parish officer or officers, who shall have in his or their custody any of the rates for the poor or land tax in such parish or place) have free liberty to inspect such rates, and take from thence the name or names of such freeholders, copyholders, or other persons qualified to serve on juries, dwelling within their respective parishes or precincts, for which such list is to be given in and returned, pursuant to the said acts; and shall yearly and every year, twenty days at least before the feast of Saint Michael the archangel, upon two or more Sundays, fix upon the door of the church, chapel, and every other public place of religious worship within their respective precincts, a true and exact list of all such persons intended to be returned to the quarter sessions of the peace, as qualified to serve on juries, pursuant to the directions of the said act, and leave at the same time a duplicate of such list with a church-warden, chapel-warden, or overseer, of the poor of the said parish or place, to be perused by the parishioners without fee or reward, to the end that notice may be given of persons so qualified, who are omitted, or of persons inserted by mistake, who ought to be omitted out of such lists; and if any person or persons, not being qualified to serve on juries, shall find his or their name or names mentioned in such list, and the person or persons required to make such list shall refuse to omit him or them, or think it doubtful whether he or they ought to be omitted, it shall and may be lawful to and for the justices of the peace for the county, riding or division, at their respective general quarter sessions, to which the said lists shall be so returned, upon satisfaction from the oath of the party complaining, or other proof, that he is not qualified to serve on juries, to order his or their name or names to be struck out, or omitted in such list, when the same shall be entered in the book to be kept by the clerk of the peace for that purpose, pursuant to the said act."

By § 2, "If any person or persons, required by the said acts to return or give in, or by virtue of this act to make up any such list, or concerned therein, shall wilfully omit, out of any such list, any person or persons, whose name or names ought to be inserted, or shall wilfully insert any person or persons, who ought to be omitted, or shall take any money or other reward for omitting or inserting any person whatsoever, he or they so offending shall, for every person so omitted or inserted in such list, contrary to the meaning of this act, forfeit the sum of twenty shillings for every such offence, upon conviction before one or more justice or justices of the peace of the county, riding, or division, where such offender shall dwell, upon the confession of the offender, or proof by one or more credible witness or witnesses

on oath, one half thereof to be paid to the informer, and the other half to the poor of such parish or place, for which the said list is returned; and in case such penalty shall not be paid within five days after such conviction, the same shall be levied by distress and sale of the offender's goods, by warrant or warrants from one or more justice or justices of the peace, returning the overplus, if any there be; and the said justice or justices, before whom such person shall be convicted of such offence, shall, in writing under their hands, certify the same to the justices at their next general quarter sessions, which shall be held for the county, in which the person or persons so omitted or inserted shall dwell, which justices shall direct the clerk of the peace for the time being to insert or strike out the name or names of such person or persons, as shall by such certificate appear to have been omitted or inserted in such lists, contrary to the meaning of this act; and duplicates of the said lists, when delivered in at the quarter sessions of the peace, and entered in such book, to be kept by the clerk of the peace, for that purpose, shall, during the continuance of such quarter sessions, or within ten days after, be delivered or transmitted by the clerk of the peace to the sheriff of each respective county, or his under-sheriff, in order for his returning of juries out of the said lists; and such sheriff or under-sheriff shall immediately take care, that the names of the persons contained in such duplicates shall be faithfully entered alphabetically, with their additions and places of abode, in some book or books to be kept by him or them for that purpose; and that every clerk of the peace neglecting his duty therein, shall forfeit the sum of twenty pounds to such person or persons as shall inform or prosecute for the same, until the party be thereof convicted upon an indictment before the justices of the peace, at any general quarter sessions of the peace to be holden for the same county, riding, division, or precinct."

By § 3, it is further enacted, "That in case any sheriff, or under-sheriff, bailiff, or other officer, to whom the return of juries shall belong, shall summon and return any person or persons to serve on any jury, in any cause to be tried before the justices of assize, or *nisi prius*, or judges of the said great sessions, or the judge or judges of the sessions for the said counties palatine, whose name is not inserted in the duplicates so delivered or transmitted to him or them by such clerk of the peace, if any such duplicate shall be delivered or transmitted, or if any clerk of assize, judge's associate, or other officer shall record the appearance of any person so summoned and returned as aforesaid, who did not really and truly appear, then and in such case any judge or justice of assize, or *nisi prius*, or judge or judges of the said great sessions, or the judge or judges of the sessions for the said counties palatine, shall and may, upon examination, in a summary way, set such fine or fines upon such sheriff, or under-sheriff, clerk of the assize, judge's associate, or other officer, for every such person so summoned and returned as aforesaid, and for every person, whose appearance shall be so falsely recorded, as the said judge or justice of assize, *nisi prius*, or of the said great sessions, or the judge or judges of the sessions for the said counties palatine, shall think meet, not exceeding ten pounds, and not less than forty shillings."

§ 4. "And for preventing abuses by sheriffs, under-sheriffs, bailiffs, or other officers, concerned in the summoning or returning of jurors, it is further enacted, That no persons shall be returned as jurors to serve on trials at any assizes, or *nisi prius*, or at the said great sessions, or at the sessions for the said counties palatine, who have served within the space of one year before in the county of Rutland, of four years in the county of York, or of

two years before in any other county, not being a county of a city or town; and if any such sheriff shall wilfully transgress therein, any judge or justice of assize, or *nisi prius*, or of the said great sessions, or the judge or judges of the sessions for the said counties palatine, may and is hereby required on examination and proof of such offence, in a summary way, to set a fine or fines upon every such offender, as he shall think meet, not exceeding five pounds, for any one offence."

‖ But by reason of the frequent sessions of *nisi prius* in the Court of King's Bench, Common Pleas, and Exchequer at Westminster, this provision was found to be impracticable in the county of Middlesex, and it is therefore enacted, by 4 Geo. 2, c. 7, that this clause shall not extend to that county; and it is provided by § 2, "That no person shall be returned to serve as a juror at any session of *nisi prius* in the county of Middlesex, who has been returned to serve as a juror at any such session of *nisi prius* in the said county, in the two terms of vacations next immediately preceding, under such penalty on the sheriff, under-sheriff, bailiff, or other officer employed or concerned in the summoning or returning of jurors in the said county of Middlesex, as might have been inflicted upon them or any of them for any offence against the above clause." And by 7 & 8 W. 3, c. 32, § 9, the inhabitants of the city and liberty of Westminster shall be exempted from serving on any jury at the sessions for Middlesex, by reason of their attendance at the courts of Westminster Hall.‖

§ 5. "And that the sheriff, under-sheriff, or other officer, to whom the return of juries shall belong, shall from time to time enter or register in a book to be kept for that purpose the names of such persons as shall be summoned, and shall serve as jurors on trials at any assizes, or *nisi prius*, or in the said courts of great sessions, or sessions for the said counties palatine, together with their additions and places of abode alphabetically, and also the times of their services; and every person so summoned and attending, or serving as aforesaid, shall (upon application by him made to such sheriff, under-sheriff, or other officer) have a certificate testifying such his attendance or service done, which certificate the said sheriff, under-sheriff, or other officer, is hereby directed and required to give without fee or reward; and the said book shall be transmitted by such sheriff, under-sheriff, or other officer, to his or their successor or successors from time to time."

§ 6. "And that no sheriff, under-sheriff, bailiff, or other officer or person whatsoever, shall directly or indirectly take or receive any money or other reward, to excuse any person from serving or being summoned to serve on juries, or under that colour or pretence; and that no bailiff or other officer appointed by any sheriff or under-sheriff to summon juries, shall summon any person to serve thereon, other than such whose name is specified in a mandate signed by such sheriff or under-sheriff, and directed to such bailiff or other officer: and if any sheriff, under-sheriff, bailiff, or other officer, shall wilfully transgress in any the cases aforesaid, any judge or justice of assize, *nisi prius*, or great sessions aforesaid, or the judge or judges of the sessions for the said counties palatine, may and is hereby required on examination and proof of such offence, in a summary way, to set a fine or fines upon any person or persons so offending, as he shall think meet, not exceeding ten pounds, according to the nature of the offence."

‖ In the case of R. v. Whitaker, Cowp. 752, the defendant was summoning bailiff to the sheriff of Middlesex, and it was his province to summon jurors to attend to try causes. An attachment was granted against him upon a charge of *demanding* and *receiving* money from several of the inhabitants to excuse them from serving, and for summoning such as refused to pay him more frequently than it came to their turn. Being examined upon interrogatories, it appeared to the court, upon the report of the master of the crown office, that he admitted having received small sums from several individuals: that in some years he had received in the whole about sixty or seventy

pounds; and in every year something, though sometimes not more than twenty pounds. But he denied ever having *demanded* it, or ever having been guilty of partiality, either in excusing those who paid him, or in summoning those more frequently than he ought to have done, who refused to pay him. He swore he *received* it only as a *Christmas box*, which had been customary, and in no other view whatever; and positively denied, that he ever acted with any partiality in consequence of its being given or refused. The court thought this to be a very bad practice, and of very evil example; wherefore they fined him two hundred pounds, and ordered him to be committed till paid. They added, that the sheriff should be informed of this, and it should be recommended to him to discharge this man from his office of summoning bailiff.‖

§ 7. "And whereas by the said act of the seventh and eighth years of the reign of his late majesty King William the Third, and also by another act made in the third and fourth years of the reign of her late majesty Queen Anne, all constables, tythingmen, and headboroughs, are obliged to give in true lists at the respective general quarter sessions of the peace, holden for each county, riding, or division, of the names and places of all persons within their respective precincts or places qualified to serve on juries, to the justices of the peace in open court, which hath by experience been found inconvenient and expensive to several constables, tythingmen, and headboroughs, such quarter sessions being often held at a great distance from their abode: for remedy thereof it is enacted, That it shall be lawful and sufficient for all or any constables, tythingmen, or headboroughs, after they shall have made and completed such lists of persons qualified to serve on juries for their respective parishes or precincts, according to the manner directed by the before-mentioned acts and this present act, to subscribe the same in the presence of one or more justice or justices of the peace for each respective county or place, and also at the same time to attest the truth of such lists upon oath to the best of their knowledge or belief, which oath such justice or justices respectively are hereby empowered and required to administer; and the said lists shall (being first signed by the said justices respectively, before whom the same shall be attested on oath, and subscribed as aforesaid) be delivered by the said constables, tythingmen, or headboroughs, to the chief or high constables of the hundreds or divisions whereunto the same shall respectively belong, who are hereby directed and required to deliver in such lists to the justices of the peace for the county, riding, or division, at their respective general quarter sessions in open court, attesting at the same time upon oath their receipt of such lists from the constables, tythingmen, or headboroughs respectively, and that no alteration hath been therein made since the receipt thereof; and the said lists, so delivered in and attested, shall be deemed as effectual as if they had been delivered in by the constables, tythingmen, or headboroughs, for their respective parishes or precincts."

‖ The 3 G. 2, c. 25, made perpetual by 6 G. 2, c. 37, is now repealed by 6 G. 4, c. 50, and the mode of making out the jury lists is now as follows under the new act.

By the fourth section the clerk of the peace of every county, &c., shall, within the first week of July, issue his warrant (in the form in the schedule) to the high constables of each hundred, &c., commanding them to issue their precepts to the church-wardens and overseers of the several parishes, and the overseers of the several townships within their respective constablewicks, requiring them to make out, before the 1st of September next, a true list of all men within their parishes and townships qualified and liable to serve on juries, according to the act; and also to perform all the requisitions in the said precepts contained.

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By § 5, the clerk of the peace is to cause a sufficient number of warrants, precepts, and returns to be printed, according to the forms set forth in the schedule, at the expense of the county; and shall annex to every warrant a competent number of preccepts and returns for the use of the persons by whom such precepts are to be issued and returns made.

By § 6, it is enacted, that within fourteen days after the receipt of such warrant, the high constable shall issue his precept (in the form in the schedule) with a competent number of the printed forms of returns to the church-wardens and overseers of the several parishes, and the overseers of the several townships, requiring them to make out a true list of all men residing within their parishes and townships qualified and liable to serve as jurors, as aforesaid, and to perform and comply with all the requisitions in the precept contained: provided that where in any hundred, &c., there shall be more than one high constable, in such case the clerk of the peace shall issue his warrant to every one of such high constables, each of whom shall be individually liable for the due performance of the several matters commanded in such warrant throughout the whole of such hundred, &c., and for non-performance shall be subject to the penalties imposed by the act upon any high constable: provided that where there shall be no overseer of the poor other than church-wardens, such church-warden shall be deemed and taken to be church-wardens and overseers within the meaning of the act; and provided that where any parish or township shall extend into more than one hundred, &c., such parish, &c., shall be deemed to be within the hundred, &c., in which the principal church shall be situate.

By § 7, it is enacted, that the justices at a petty session before the 1st of July in any year, may make an order for annexing any extra-parochial place to any parish or township for the purposes of the act, and a copy of such order shall within five days be served on the church-wardens and overseers of such adjoining parish, or on the overseers of such adjoining township; and such extra-parochial place shall from thence continually be deemed, for the purposes of the act, an integral part of such parish or township.

By § 8, the church-wardens and overseers shall forthwith, after the receipt of such precept from the high constable, make out in alphabetical order a true list of every man within their parishes, &c., qualified and liable to serve on juries, with the Christian and surname at full length, the true place of abode, title, quality, calling or business, and nature of the qualification of every man in the proper columns of the return in the schedule.

By § 9, the church-wardens, having made out according to the act a list of every man qualified and liable to serve on juries as aforesaid, shall, on the three first Sundays in September, fix a true copy of such list upon the principal door of every church, chapel, &c., within their parishes or townships, first subjoining to every such copy a notice stating that all objections to the list will be heard by the justices at a time and place mentioned in such notice, and having also signed their names at foot of such copy, and shall keep the original list, to be perused by any of the inhabitants of their respective parishes or townships at any reasonable time during the three first weeks of September without fee, to the end that notice may be given of men qualified who are omitted, and of men inserted who ought to be omitted.

By § 10, the justices shall hold a special petty sessions for the purposes of the act, within the seven last days of September, of which notice shall be given by their clerk before the 20th August to the high constable and

church-wardens and overseers of every parish, and the overseers of every township within the division, and the church-wardens and overseers then and there shall produce the lists of jurors made out as before directed, and shall answer on oath such questions touching the same as shall be put to them by the justices; and if any man not qualified and liable is inserted in such list, the justices on satisfaction, on oath of the party complaining, or other proof, or upon their own knowledge that he is not qualified and liable, may strike out his name, and also the names of persons disabled by lunacy, imbecility, deafness, blindness, or permanent infirmity of body, and may insert the name of any man omitted, and reform any errors or omissions in the list: and when such list shall be duly corrected, it shall be allowed by the justices, or two of them, at the sessions or the adjournment thereof, authorized by the act, who shall sign the same with their allowance thereof; and the high constable shall receive the list so allowed, and deliver the same to the quarter sessions next holden for the county, &c., on the first day of its sitting, at the same time attesting on oath the receipt of such list from the petty sessions, and that no alteration hath been made therein since his receipt thereof.

By § 11, the church-wardens and overseers shall, for their assistance in completing the lists pursuant to the act (on request made between the 1st July and the 1st October to any collector or assessor of taxes, or any officer having the custody of any duplicate or tax assessment,) have free liberty to inspect any such duplicate or assessment, and take there the names of men qualified to serve as jurors; and every petty sessions and justice of the peace shall have the like liberty to inspect any duplicate tax, assessment, or poor rate for the purpose of assisting them in the completion of the jury lists.

By § 12, the clerk of the peace shall keep the lists so returned by the high constable to the quarter sessions among the records of the sessions, arranged with every hundred in alphabetical order, and shall cause the same to be fairly copied in the same order in a book, with proper columns for making the register after directed, and shall deliver the same book to the sheriff of the county or his under-sheriff within six weeks after the close of such sessions, which book shall be called "The Jurors' Book for the year ;" and every sheriff on quitting office shall deliver the same to his successor, to be brought into use on the first day of January for one year then next.

By § 14, the sheriff, on receipt of every *venire facias* and precept for the return of jurors, shall return the names of men contained in the jurors' book for the then current year, and no others; and when process is directed to the coroner, elisor, &c., he shall have free access to the jurors' book for the current year, and shall return names contained therein, and no others; provided that if there be no jurors' book in existence for the current year, it shall be lawful to return jurors from the jurors' book for the year preceding.

By § 15, every sheriff or minister to whom the return of juries at *nisi prius* in any county (except counties palatine) shall belong, shall, on the return of every *venire facias* (unless in causes intended to be tried at bar or by special jury,) annex a panel to the writ containing the names alphabetically arranged with the abodes and additions of a competent number of jurors from the jurors' book, and the names of the same jurors shall be inserted in the panel annexed to every *venire facias* for the trial of all issues in each county, which number shall not be less than forty-eight, nor more than seventy-two, unless by direction of the judges of assize, who are empowered

to direct a greater or lesser number; and in the writ of *habeas corpora juratorum*, or *distringas*, it shall be sufficient to insert in the mandatory part of such writs "the bodies of the several persons in the panel to this writ annexed, named," and to annex to such writs panels containing the same names as returned in the panel to the *venire facias*, the ancient legal fee to be taken, and no other; and the men named in such panels, and no others, shall be summoned to serve on juries at the then next court of assizes or sessions of *nisi prius* for the counties named in such writs.

(As to the returns of jurors in counties palatine and in Wales, see §§ 17, 18.)

By § 19, the sheriff (except in the counties palatine) shall cause to be made an alphabetical list of the names of all the jurors contained in the panels to the writs of *venire facias* annexed as aforesaid, with their abodes and additions, and the sheriff in any county palatine or Wales shall cause to be made a like list of all the jurors summoned in said counties, and shall keep such list in the office of his under-sheriff or deputy for seven days before the sitting of the next court of assize or *nisi prius*, and the parties in all causes to be tried, and their attorneys shall have full liberty to inspect such list without fee.

(In lieu of 42 Edw. 3, c. 11, and 6 H. 6, c. 2.)

§ 20, provides that the Court of King's Bench and all courts of *oyer* and *terminer*, jail-delivery, the superior criminal courts of the three counties palatine, and courts of sessions of the peace in England, and courts of great sessions and sessions of the peace in Wales shall have the same power as heretofore in issuing any writ or precept, or making any award or order for the return of a jury for the trial of any issue before such courts or the amending any panel; and the return to every such writ, precept, &c., shall be made in manner accustomed, except that the jury shall be returned from the body of the county, and not from any hundred or particular venue within the county, and shall be qualified according to the act.

Where the bailiffs of a liberty had always attended the quarter sessions and made returns of the jurors resident within the liberty; held, that the bailiff was bound, in obedience to the precept of the sheriff, to summon the jury within the liberty to attend the quarter sessions, and that he was liable to be fined by the quarter sessions for refusing.

Rex v. Jaram, 4 Barn. & C. 692.‖

4. *In what time such Processes are returnable.*

Process against jurors may be returnable immediately into the King's Bench for the trial of an indictment found in the (*a*) county where it sits, whether for a crime in such county, or for a treason beyond sea. But for the trial of an indictment removed by *certiorari* from a different county, there must be fifteen days between the teste and return of every process.

2 Roll. Abr. 626; 9 Co. 118 b; 2 Inst. 568; 2 Hawk. P. C. c. 41, § 3. (*a*) Whether such indictment were originally taken in the King's Bench, or taken before justices of the peace of the same county, and removed into the King's Bench by *certiorari*. 2 Hal. Hist. P. C. 260.

Justices in *eyre*, or of jail-delivery, may order a jury to be returned immediately for the trial of a prisoner. Also it hath been adjudged, that justices of (*b*) *oyer and terminer* may for the trial of an issue joined before them award a *venire* returnable the same day on which the party is arraigned: and it hath been adjudged, that justices of the peace may do

the like; but it is said, that there are strong authorities to the contrary, unless the prisoner consent, or the crime amount to felony.(*c*)

2 Hawk P. C. c. 41, § 4, and several authorities there cited. (*b*) That as to the commission of *oyer* and *terminer*, though there goes out a general precept in the names of three or more of the commissioners, and under their seals, fifteen days before the sessions, directed to the sheriff to return twenty-four jurors to try the issue between the king and the prisoners to be arraigned; yet this is but preparatory, and to have a jury in readiness; for after the prisoners are arraigned, and have pleaded to the country, a precept ought to issue to the sheriff in nature of a *venire facias*, which may bear teste the same day that the prisoners plead, commanding the sheriff to return twenty-four, &c., to try the issue upon such a day. 2 Hal. Hist. P. C. 261. ——Or they may make the precept returnable the same day that the prisoners plead, viz. *ad horam primam post meridiem*, &c., for justices of *oyer* and *terminer* may take their indictment and arraign the prisoners, and try the same day. Ibid.—And it is there also said, that the justices of the peace, as to the point of their precepts of *venire facias*, agree with justices of *oyer* and *terminer;* for they are, as to this purpose, commissioners of *oyer* and *terminer*, and may indict, arraign, and try the same day, in cases of felony. (*c*) But see the act of 60 Geo. 3, c. 4, to prevent delay in the administration of justice in cases of misdemeanor.

A *venire* before justices of *oyer* and *terminer*, returnable at a day certain, is erroneous, unless the sessions appear to be adjourned to the same day, because otherwise it shall not be intended that their commission continued so long; but such *venire* may be returnable at the next assizes, and then tried by virtue of 1 E. 6, c. 7.

2 Hal. Hist. P. C. 261; 2 Hawk. P. C. c. 41, § 6.

Here it may be proper to take notice, that the statutes of 4 and 5 W. and M. c. 24, and 7 & 8 W. 3, c. 32, require that jurors shall be summoned six days before they appear, which seems to make it necessary that whenever a *venire facias* or particular precept is required, there should be six days between its teste and return; and to this purpose it is enacted by the last mentioned statute, § 5, "That every summons of any person qualified to any of the services in the act mentioned, shall be made by the sheriff, his officer, or lawful deputy, six days before at the least, showing to every person so summoned the warrant under the seal of the office, wherein they are nominated and appointed to serve; and in case any juror, so to be summoned, be absent from the usual place of his habitation at the time of such summons, in such case notice of such summons shall be given by leaving a note in writing, under the hand of such officer, containing the contents thereof, at the dwelling-house of such juror, with some person there inhabiting in the same.

"Provided that those acts shall not extend to give or require any longer time for the summoning of any juries, that are to try any issues joined in any of the said courts that are triable by jurors of the city of London or county of Middlesex, than was by law required before the making of the act; nor shall extend or be construed to give any longer time, or other day, for the return of any writ, precept, or process of *venire facias*, *habeas corpora* or *distringas*, for the summoning, attaching, or distraining of any jury to appear, than was by law required before the making the said act; but that where there shall not be six days between the awarding of such writ, precept, or process, and return thereof, every juror may be summoned, attached, or distrained to appear at the day and time therein mentioned or appointed, as he might have been before the making of the act."

5. *Where the Jury must appear.*

At common law, the jurors and parties were to appear at the court (*a*)

(B) Of the Jury Process, and Manner of convening.

where the suit or prosecution was depending, which occasioned a great expense, and a great conflux of people to the superior courts; to remedy which inconveniency, it was ordained by Westm. 2, c. 30, that all pleas in either bench, which require only an easy examination, shall be determined in the country, before the justices of assize, by virtue of the writ prescribed by that statute, commonly called the writ of *nisi prius*.

2 Inst. 421, 422, &c.; 4 Inst. 159; Cro. Car. 349. (*a*) The award of a *venire* returnable at a certain day before justices of *oyer*, &c., needs not express before what justices it shall be returnable, for it cannot but be intended that it ought to be returned before the court that awards it. 29 E. 3, 20 b; 29 Ass. p. 33, S. C.; Br. tit. *Error*, p. 124, S. C.; Dyer, 315, pl. 99, S. C.; 2 Keb. 855.

The manner of contriving it was to direct the *venire* to return the jury at some day the next term, unless the justices *prius tali die, et loco venerint;* and thus the *nisi prius* was at first on the *venire*, and continued in that manner from Ed. 1 to Ed. 3, for though there were no issues returned on the *venire* to make them appear at *nisi prius;* yet it was so much a greater difficulty on them to appear afterwards at Westminster, which if they did not, the *distringas* issued, that it had its effect to bring them in their proper counties. The writ was contrived to command them to come into court, because it would have been improper for the court to have commanded them to come into any other place; so that their appearance before the justices of assize is an excuse for their non-appearance in bank; but, if they did not appear at the assize, nor at Westminster, then issued a *habeas corpora* and *distringas* to bring them up.

2 Inst. 423; Gilb. Hist. C. P. 74.

The ancient practice of the defendant's being essoignable on the *venire* was a great mischief in this process, because, if he did not appear, the jury were afterwards obliged to appear in bank. And there was another mischief in this process as it then stood, that the parties not seeing the panel beforehand, they could not be prepared to make their challenge. The first of these mischiefs was pretty well remedied by laying the costs on the defendant when the plaintiff prevailed; but the second mischief had no remedy till 42 E. 3, c. 11, whereby it is ordained, that no inquests but assizes and delivery of jails be taken by writ of *nisi prius*, or other manner, at the suit of great or small, before that the names of all of them that shall pass in the inquest be returned into the court; and this set the process on the same foot it now stands.

Gilb. Hist. C. P. 76.

From henceforward they could not place the *nisi prius* in the *venire*, as was directed by the statute of Westminster 2, because it is directed that no inquest be taken at *nisi prius* until the inquest be returned in court, and therefore the clause of *nisi prius* was taken out of the *venire*, and placed to the *habeas corpora* and *distringas*, which was so awarded on the roll in the *jurat*. This had many good effects; 1st. For that the plaintiff and defendant knew the names of the jury, in order to their challenges. 2dly. The *venire* being returned, the defendant had no essoign on the *habeas corpora* and *distringas*, but was obliged to appear, else by Westminster 2, c. 27, the inquest was taken by default, as if he had appeared. Another advantage was, that the jury on the *nisi prius* were fined if they did not appear; and therefore the clause in the *distringas* is *quod habeas corpora eorum coram nobis apud Westm. die Lunæ prox. post* *vel coram justiciariis nostris ad assisas in com. tuo tenend. assign., si prius die, &c.,*

and since they could fine them on this process according to their offence, they granted *nisi prius* in the ensuing *distringas*, and did not compel them to try it at bar; which was more convenient than the ancient way, where the appearing juror was obliged by his companion's default to come up to Westminster; but now every one has issues returned on him for his own default.

Gilb. Hist. C. P. 77.

The day at *nisi prius* and in bank are in consideration of law the same, because the writ of *nisi prius*, which gives authority to the judge to try the cause in the country, is instead of the court, and therefore the *postea* certified by him on the day in bank is the same as if the jury had come up to the court, and the trial had been had in open court. And this, as has been said, is for the ease of the subject, that the jury and witnesses may not be brought out of their proper county.

6 Mod. 9; Ibid. 82.

It seems agreed, that an issue joined in the King's Bench upon an indictment or appeal, whether for treason or felony, or a crime of an inferior nature, committed in a different county from that wherein the court sits, may be tried in the proper county by writ of *nisi prius*, by virtue of the statute of Westminster 2, c. 30.

Cro. Car. 348; 2 Inst. 424; 4 Inst. 73, 74; Raym. 367.

Yet inasmuch as the king is not expressly named in the statute, and it is a general rule that he shall not be bound by a statute which doth not expressly name him, it seems to have been generally holden, that wherever the king is a party, it is irregular to grant a trial by *nisi prius* without his special warrant, or the (*a*) assent of his attorney. But it seems the court may grant it in an (*b*) appeal in the same manner as in any other action.

2 Leon. 110; 6 Mod. 123. (*a*) In an Indictment of barratry, which seemed to require great examination, the court refused to grant a trial by *nisi prius* at the motion of the attorney-general, till the king by his letters had signified his pleasure that it should be so tried. Cro. Car. 348. (*b*) But not where the jury is to be from two counties. Dyer, 46, pl. 8. See 2 & 3 E. 6, c. 24, § 2, 3.

6. *What Number are to be returned.*

Although by the words of the writ of *venire facias* the sheriff is only to return twelve, yet by ancient course he was obliged to return twenty-four. And this, says my Lord Coke, is for expedition of justice; for if twelve only should be returned, no man should have a full jury appear or be sworn in respect of challenges without a *tales*, which would be a great delay of trials.

Co. Lit. 155 a.

But, though the sheriff return a less number; as, where the sheriff returned only twenty-three, and a sufficient number appear, and try the issue; this will be aided by statutes of *jeofail* as a misreturn.

Cro. Car. 223.

The precept that issues before a sessions of jail-delivery, *oyer* and *terminer*, and of the peace, is to return twenty-four, and commonly the sheriff returns upon that precept forty-eight.

2 Hal. Hist. P. C. 263.

But the award or precept to try the prisoner after he hath pleaded, is only *venire facias* twelve, and (*c*) twenty-four are returned by the sheriff on that panel.

2 Hal. Hist. P. C. 263. (*c*) But it has been holden, that in trials on the crown side

for criminals, the sheriff may be commanded to return any number the court please, and accordingly, in Sir Harry Vane's trial, the sheriff returned sixty. Kelyng, 16.

At common law in civil causes, it seems the sheriff might have returned above twenty-four if he pleased; and therefore by the statute of (*d*) Westminster 2, c. 38, it is recited, That whereas the sheriffs were used to summon an unreasonable multitude of jurors, to the grievance of the people, it is ordained, that from thenceforth in one assize no more shall be returned than twenty-four.

Godb. 370; Keb. 310. (*d*) This statute extends not to jurors returned for trial of criminal persons. Kel. 16.

And now by the 3 Geo. 2, c. 25, § 8, it is enacted, "That every sheriff or other officer, to whom the return of the *venire facias juratores*, or other process, for the trial of causes before justices of assize or *nisi prius*, in any county in England, doth or shall belong, shall upon his return of every such writ of *venire facias*, (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck by order or rule of court) annex a panel to the said writ, containing the Christian and surnames, additions, and places of abode of a competent number of jurors named in such lists as qualified to serve on juries, the names of the same persons to be inserted in the panel annexed to every *venire facias* for the trial of all issues at the same assizes in each respective county; which number of jurors shall not be less than forty-eight in any county, nor more than seventy-two, without direction of the judges appointed to go the circuit, and sit as judges of assize or *nisi prius* in such county or one of them, who are respectively hereby empowered and required, if he or they see cause, by order under his or their respective hand or hands, to direct a greater or less number; and then such number, as shall be so directed, shall be the number to serve on such jury; and that the writs of *habeas corpora juratorum* or *distringas*, subsequent to such writ of *venire facias juratores*, need not have inserted in the bodies of such respective writs the names of all the persons contained in such panel; but it shall be sufficient to insert in the mandatory part of such writs, respectively, *corpora separalium personarum in panello huic brevi annexo nominatarum*, or words of the like import; and to annex to such writs respectively panels containing the same names as were returned in the panel to such *venire facias*, with their additions and places of abode, that the parties concerned in any such trials may have timely notice of the jurors who are to serve at the next assizes, in order to make their challenges to them, if there be cause; and that for the making the returns and panels aforesaid, and annexing the same to the respective writs, no other fee or fees shall be taken than what are now allowed by law to be taken for the return of the like writs and panels annexed to the same; and that the persons named in such panels shall be summoned to serve on juries at the then next assizes or sessions of *nisi prius* for the respective counties to be named in such writs, and no other."

Before this statute the sheriff used to return a separate jury in every cause.

By § 9, "Every sheriff, or other officer, to whom the return of juries for the trial of causes in the court of grand sessions in any county of Wales do or shall belong, shall, at least eight days before every grand sessions, summon a competent number of persons qualified to serve on juries, out of every hundred and commote within every such county, so as such number be not less than ten, or more than fifteen, without the directions of the judge or judges of the grand sessions held for such county, who is and are hereby

empowered, if he or they shall see cause, by rule or order of court, to direct a greater or lesser number to be summoned out of every such hundred and commote respectively; and the said officer and officers, who shall summon such persons, shall return a list containing the Christian and surnames, additions, and places of abode, of the persons so summoned to serve on juries, the first court of the second day of every grand sessions; and the persons so summoned, or a competent number of them, as the judge or judges of such grand sessions shall direct, and no other, shall be named in every panel to be annexed to every writ of *venire facias juratores*, *habeas corpora juratorum*, and *distringas*, that shall be issued out and returnable for the trial of causes in such grand sessions.

‖ Since this act there can be only one general return; so that it need not appear on the return of the *venire*, that the jury have been summoned, or on the return of the *habeas corpora*, that they were attached by pledges. Philipps v. Philipps, Andr. 248.‖

By § 10, "Every sheriff, or other officer, to whom the return of the *venire facias juratores*, or other process for the trial of causes before the justices of the courts or sessions to be held for the counties palatine of Chester, Lancaster, or Durham, doth belong, shall, fourteen days at the least before the said courts or sessions shall respectively be held, summon a competent number of persons qualified to serve on juries, so as such number be not less than forty-eight, nor more than seventy-two, without the direction of the judge or judges of the courts or sessions to be held for such counties palatine respectively, and shall, eight days at the least before such courts or sessions shall respectively be held, make, or cause a list to be made, of the persons so summoned to serve on juries, containing their Christian and surnames, additions, and places of abode; and the list so made shall forthwith be publicly hung up in the sheriff's office, to be inspected and read by any person or persons whatsoever; and the persons named in such list, and no other, shall be summoned to serve on juries at the next courts or sessions to be held for the said respective counties palatine; and the said sheriff, or other officer, is hereby required to return such list on the first day of the court or sessions to be held for the counties palatine respectively; and the persons so summoned, or a competent number of them, as the judge or judges of such courts or sessions respectively shall direct, and no other, shall be named in every panel, to be annexed to every writ of *venire facias juratores*, *habeas corpora juratorum*, and *distringas*, that shall be issued out and returnable for the trial of causes in such courts or sessions respectively."

7. *Of awarding Process by* Proviso.

If the plaintiff after issue joined neglects to try his cause the first assizes in the country, or the first term in Middlesex or London, the defendant is at liberty to bring down the cause by *proviso*, so called by the clause in the *venire facias*, which says, *proviso semper, quod si duo brevia inde tibi pervenerint, unum eorundem tantum retorn. et exequaris;* for both plaintiff and defendant having put themselves upon their country, the plaintiff's laches shall not prevent the defendant's discharging himself from the action, and therefore the process is as well open for him as for the plaintiff. Gilb. Hist. C. P. 91.

This process by *proviso*, (*i. e.* with a clause that if two writs come to the sheriff, he shall execute one of them only) may be taken out not only when the plaintiff neglects to take out the *venire* the same term, but also upon his neglect to get it returned; and in like manner if the plaintiff makes the like

default in suing out an *habeas corpora*, or other subsequent process, the defendant may sue out the like process by *proviso*.

Dyer, 215, pl. 51, 284, pl. 34; Cro. Car. 484; Keilw. 176, pl. 11.

But, where the defendant hath sued out any process by *proviso*, there are authorities that the plaintiff is to sue out the proper subsequent process upon it in the same manner as if he had sued out the first, and that it is irregular for a defendant to take out any such subsequent process till the plaintiff has made a default in respect of the same kind of process, except only in such actions wherein the defendant is an actor as well as the plaintiff, as in replevin, or error, or *quare impedit* against a patron only, or prohibition, &c., in which actions the defendant may either take out process by *proviso*, (*a*) without any default in the plaintiff, or may, if he think fit, take it out in the same manner as the plaintiff, without any clause of *proviso*.

Dyer, 193, pl. 28, 284, pl. 34; Dennis v. Dennis, 2 Lev. 5, 6; 2 Saund. 336, S. C.; Reg. v. Banks, 6 Mod. 246; 2 Salk. 652, S. C. ‖ (*a*) This seems to be the general practice. Jones v. Concannen, 3 T. R. 661; Eggleton v. Smart, 1 Bl. Rep. 375. But before the defendant can have such trial by *proviso*, he must procure a rule for that purpose; for without it he cannot take down the record, though it may be obtained by him, after he has given notice of trial. Dodson v. Taylor, 2 Str. 1055; Proude v. Willimote, 1 Barnardist. 18; King v. Pippett, 1 T. R. 695; Tidd's Pr. 689.‖

It seems agreed, that neither in actions wherein the king is sole party, nor in indictments, can there be any process taken out by *proviso*, because no laches are imputable to the king. Also, it hath been questioned, whether there can be any such process in informations *qui tam*, because the king is in some sort a party.

2 Leon. 110; Keb. 195; 6 Mod. 246; but Sid. 316, *contr.*

But it seems agreed, that it may be so awarded in any appeal, whether capital or not capital, in the same manner as in other actions, after the appellant hath made default in relation to the very same kind of process.

Keilw. 176, pl. 70.

By the 7 & 8 W. 3, c. 32, which gives a *venire facias de novo* where the cause is not tried the first assizes, it is enacted, "That if any defendant or tenant in any action depending in any of the courts of Westminster shall be minded to bring to trial any issue joined against him, when by the course in any of the said courts he may lawfully do the same by *proviso*, such defendant or tenant shall or may, of the issuable term next preceding such intended trial to be had at the next assizes, sue out a new *venire facias* to the sheriff by *proviso*, and prosecute the same by writ of *habeas corpora* or *distringas*, with a *nisi prius*, as though there had not been any former *venire facias* sued out or returned in that cause; and so *toties quoties* as the matter shall require."

‖ Where the record is carried down by the defendant, and the issue happens to be upon the plaintiff, who is therefore to begin, but he does not appear, the defendant cannot enter upon his proof, and take a verdict, but the proper course is to call the plaintiff and nonsuit him.

Dennis v. Dennis, 2 Saund. 334; Gardener v. Davis, 1 Wils. 300; Hicks v. Young, Barnes, 458.

The trial by *proviso* was the only way, before the statute of 14 Geo. 2, c. 17, was passed, which the defendant had of getting rid of the action, where the plaintiff neglected to proceed to trial; and that statute

has been holden not to extend to replevin, because there the defendant is an actor and may carry down the cause to trial himself.

Eggleton v. Smart, 1 Bl. Rep. 375; Jones v. Concannen, 3 T. R. 661; Shortridge v. Hiern, 5 T. R. 400.

The motion for judgment as in case of a nonsuit being now generally substituted for the trial by *proviso*, as a term's notice is not requisite in the former case, so neither is it necessary in case of a trial by *proviso*, after a lapse of four terms without any proceeding.

Theobald v. Crickmore, 2 Barn. & Ald. 594; Doe v. Moses, 5 T. R. 634; Manby v. Wortley, 2 Bl. Rep. 1224.‖

8. *Of the Necessity of returning a Panel into Court and where a Prisoner may demand a Copy of it.*

By the 42 E. 3, c. 11, it is recited, that divers mischiefs had happened, because that the panels of inquests, which had been taken before justices by writ of *scire facias* and other writs, had not been returned before the sessions of the justices at the *nisi prius*, and otherwise, so that the parties could not have knowledge of the names of the persons which should pass in the inquest; whereby divers of the people had been disinherited and oppressed; and thereupon it is ordained, "That no inquest but (*a*) assizes and deliverances of jails be taken by writ of *nisi prius*, nor any other manner, at the suit of the great or small, before the names of all of them that shall pass in the inquest be returned in the court."

(*a*) The statute of 6 H. 6, c. 2, provides also for assizes. 3 Inst. 175.

This statute extends as well to writs of *nisi prius* in criminal cases as in civil, and to jurors returned upon a *tales* as well as to those returned upon a principal panel.

2 Hawk. P. C. c. 41, § 21.

But it seems that in trials before the justices of jail-delivery the prisoner has no right to a copy of the panel before the time of his trial, except only in cases within the purview of 7 & 8 W. 3, c. 3, § 7, which enacts, "That all and every person or persons who shall be accused, indicted, and tried for high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall have copies of the panel of the jurors, who are to try them, duly returned by the sheriff, and delivered unto them and every of them so accused and indicted respectively, two days at the least before he or they shall be tried for the same."

2 Hawk. P. C. c. 41, § 22.

It hath been adjudged to be sufficient, within the intent of this act, to deliver to the prisoner a copy of a panel arrayed by the sheriff before it is returned to the court, if the very same panel be afterwards returned.

9. *Of the Trials going off* pro Defectu Juratorum; *and therein of drawing a Juror.*

If a *venire* is awarded, and the parties do not go to trial the next assizes, but it lies for several terms, the continuance may be made by a *vicecomes non misit breve*. But, if a *nisi prius* be awarded, and some of the jury appear, and the panel be not full, so that the trial is not carried on, they enter those of the jury that appeared, and *alii non venerunt, ideo respectuentur* to the next term *pro defectu juratorum;* and at the day in the next term they award an *alias distringas* to the next assizes, with a *nisi prius* until the next term.

Vide the statute 7 & 8 W. 3, c. 32, which gives a *venire facias de novo*, in case the

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cause be not tried the first assizes. [But, notwithstanding the statute, if after a special jury has been struck, the cause goes off for defect of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed. R. v. Perry, 5 T. R. 453. And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriffs. R. v. Hart, Cowp. 412.]

It is holden by the opinion of some, that in a criminal case not capital, after a jury sworn and empannelled, and all the evidence given, the king's counsel may, without the party's consent, withdraw a juror, and have the cause tried over again.

Vent. 28; Raym. 84.

But herein the better opinion seems to be; 1st, That in capital cases a juror cannot be withdrawn, though all parties consent to it. 2dly, That in criminal cases not capital a juror may be withdrawn, if both parties consent, but not otherwise. 3dly, That in all (*a*) civil causes a juror cannot be withdrawn, but by consent of all parties.

Carth. 465. (*a*) Where the jurors lying all night, could not agree, a juror by consent was drawn. Cro. Car. 484.

It hath been holden, that a juror withdrawn from the panel by consent of both parties, to the intent the trial might for that time go off *pro defectu juratorem*, it being necessary for the jury to have a view, may be of the jury, when the cause comes to be tried at a subsequent time, and that this being neither a principal cause of challenge, nor to the favour, cannot be error.

Hewett v. Bainard, 10 Mod. 390.

(C) In what Cases, and in what Manner a *Tales* is grantable.

Since the (*b*) 3 Geo. 2, for the regulation of juries, by which the sheriff cannot return less than forty-eight jurors, the use of a *tales* seems to be taken away; but as the statute herein extends only to civil causes, it will still be necessary to consider the manner of awarding a *tales*, especially in criminal cases.

(*b*) It hath been holden, since this statute, that a *tales de circumstantibus* was allowable upon special juries, by Raymond, C. J., in the case of the King v. Franklin, Trin. 5 Geo. 2; 2 Kel. 77, pl. 39; 21 Vin. Abr. 313, pl. 12.*——*In special jury causes, and in common, a *tales* is allowable.—It is the constant practice.

If all the jury did not attend on the *habeas corpora* or *distringas*, whether by reason of the death of some of the persons returned, or for any other cause; or if so many be challenged and drawn, that there do not remain a sufficient number to make a jury; or if after the jury is charged one or more of them die; there are at common law the writs of *undecim*, *decem*, or *octo tales*, (*c*) according as the number was deficient, to force others into court to try the issue; or by (*d*) statute, the plaintiff may pray a *tales de circumstantibus* to prevent the delay of the *decem tales*.

10 Co. 104; Dyer, 359, pl. 2; 2 Roll. Abr. 671; Plow. 100; 2 Hal. Hist. P. C. 266. [(*c*) This is still necessary on trials at bar. 5 T. R. 456, 457, 462.] (*d*) For this purpose, vide the statutes 35 H. 8, c. 6, made perpetual by 2 & 3 E. 6, c. 32; 4 & 5 Ph. & Mar. c. 7, 5 Eliz. c. 25, 14 Eliz. c. 9, 7 & 8 W. 3, c. 32.—[The plaintiff may avoid a nonsuit by refusing to pray a *tales*. Jenkins v. Purcel, 2 Str. 707.]

A *tales* may be granted as well on the application of the defendant as plaintiff; but it seems that a defendant cannot regularly pray it till there has been a default in the plaintiff.

Cro. Car. 484; 10 Co. 104; 2 Roll. Abr. 671, and in Dyer, 359, pl. 2, it is said, that if a full jury do not appear, and the plaintiff prays a *distringas* without praying

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any *tales*, the court ought to grant it at the prayer of the defendant. β Talesmen must possess the requisite qualifications of other jurors. Sheepshanks v. Jones, 2 Hawks, 211; State v. Greenwood, 1 Hayw. 141.*g*

In capital cases the *tales* may be granted for a larger number than the first process; as for sixty, or forty, or any other even number, in order to prevent delays from peremptory challenges. And in this respect a *tales* in capital cases is different from what it is in any other case; it being an allowed rule, that in all (*a*) other cases the *tales* must be for a less number than the first process.

Buls. 121; Dyer, 213, pl. 41. (*a*) But a *tales de circumstantibus* may be of an uncertain number. 10 Co. 105 a. β The law is silent as to the number of talesmen, which a sheriff must summon; it therefore belongs to the court, in its discretion, to determine the number, and should it not do so, the sheriff is left to summon such number as he may deem necessary. State v. Lamon, 3 Hawks, 175.*g*

Every subsequent *tales* in capital, as well as in all other cases, must be for a less number than the former, except the former were quashed, in which case the next may be for the same number.

10 Co. 105 a; Keilw. 176.

The quashing of the array of the principal panel doth not quash that of the *tales*, but the inquest shall be taken by those returned on the *tales*, if there be a sufficient number, otherwise more shall be added to them by a new *tales*. But, if all the persons returned on a *habeas corpora* be challenged and drawn, there shall not be a *tales* awarded but a new *venire;* for the word *tales* plainly refers to some others, to whom the persons returned are to be like. Also, if the first *habeas corpora* be quashed, the second with a *tales* cannot be quashed with it, and the party must go on as if the *venire* had only been returned, and nothing done upon it; for where a process is quashed, all that follows and depends upon it falls with it.

10 Co. 104; Dyer, 245, pl. 64.

It seems, that a *tales* is not grantable on the return of *venire*, (*b*) but only on the return of a *habeas corpora* or *distringas*, because it appears not before such return, but that a full jury may appear.

Cro. Eliz. 502; 2 Roll. Abr. 671. ‖ (*b*) If it be granted on the *venire facias*, it will be a mis-trial. *Per* Holt, C. J., 2 Lord Raym. 1170.‖

A *distringas* or *habeas corpora*, with a command to add so many more to those summoned on the *venire*, is the first process against the *tales*.

Roll. Abr. 798.

If a juror be withdrawn after a trial commenced, whereon a *tales de circumstantibus* was awarded, and afterwards a new *habeas corpora* be taken out with a *tales*, it shall appoint the *tales* to be added to the jurors first returned, and also to those returned on the *tales de circumstantibus*.

Cro. Ja. 677.

The statutes, which authorize justices of *nisi prius* to award a *tales de circumstantibus*, extend as well to all capital cases as to others. But it seems that such a *tales* cannot be prayed for the king upon an indictment, or criminal information, without a warrant from the attorney-general, or an express assignment from the court, before which the inquest is taken.

Raym. 367; Keb. 490; 6 Mod. 246. [Such warrant not necessary where the prosecutor hath an interest. 1 Lev. 223.] ‖ And though the trial be in a county palatine, yet the warrant must be from the king's attorney-general, not from the attorney-general of the palatinate. R. v. Lambe, 4 Burr. 2171.‖

It seems not to be clear, that a *tales* is grantable by justices of *oyer*, &c.,

(D) How Special Juries are appointed.

or of (*a*) jail-delivery. But, if a trial be put off before justices of jail-delivery for want of a full jury, they may, without doubt, order a larger panel, whereon the former jurors should be returned in the same order as before, and called to be sworn as they stand, without any more regard to those who were sworn before than to the others; and the like method is to by observed as to a jury returned with a *tales*.

Keilw. 176, pl. 10; Plow. 100; Yelv. 23; Jenk. 340. (*a*) That before justices of jail-delivery this learning of *tales* is not of much use, because there is no particular precept to the sheriff to return either jury or *tales*, but the general precept before the sessions, and the award or command of the court upon the plea of the prisoner. 2 Hal. Hist. P. C. 266.

On a writ of error of a judgment given in the court of Bristol, it was solemnly adjudged, that a custom in an inferior court to try by a *tales de circumstantibus* was void, as it breaks down that important rule, that trials must be *per pares*, and admits an unlimited latitude of gleaning together and set of men for jurors, however profligate and unfit for the office, and entirely deprives the parties of their challenges.

Mich. 6 Geo. 2, in B. R. Bell v. Knight, vide Styl. 16.

It was agreed to be common practice in the circuits, that if but one juror appears and he is challenged, there may be twelve talesmen sworn, who may try the cause.

Sel. Cas. Evid. 110.

[A juror who has been challenged on the principal panel, ought not to be sworn as a *talesman*.

Parker v. Thoroton, 1 Str. 640; 2 Ld. Raym. 1410.]

ß Persons who are not by-standers in the court may be summoned as talesmen, for when they came in they were by-standers.

State v. Lamon, 3 Hawks, 175.ℊ

‖By 6 G. 4, c. 50, § 37, where a full jury shall not appear before any court of assize or *nisi prius*, or civil court of the counties palatine or court of great sessions, or where by challenge of the parties the jury is likely to remain untaken for default of jurors, such court on request for the king or the parties, plaintiff or defendant, or their attorneys, shall command the sheriff, &c., to name so many other able men of the county then present, as shall make up a full jury, and return such men, and add their names to the panel; provided that where a special jury shall have been struck, the talesmen shall be such as shall be empannelled upon the common jury panel, to serve at the same court, if a sufficient number of such men be found, and the king and the parties shall have their lawful challenges to such added jurors.

Upon an award of *tales* at *nisi prius*, it is not necessary that the *tales* should be selected out of persons accidentally present, they may be selected out of persons whose presence the sheriff or coroner has taken previous means to obtain. The panel of *tales* having been quashed in a special jury case, on the ground of unindifference in the sheriff, it was held that a *venire facias* was properly awarded to the coroner, although two of the special jurors appeared and were sworn on the former occasion.

Rex v. Dolby, 2 Barn. & C. 104.

(D) In what Cases, and in what Manner, Special Juries are appointed.

Special juries are appointed on motion and application to the court for that purpose, on which, if the court think it reasonable, the sheriff is to attend the secondary or master with his book of freeholders, who, in the

presence of the attorneys on both sides, names (*a*) forty-eight freeholders, and then each party strikes out twelve, by one at a time, the plaintiff or his attorney beginning first, and the remaining twenty-four are returned by the secondary, as the jury, to try the cause.

2 Lil. Regist. 155. The court may order a jury of merchants if they think it convenient. Ibid. ‖ And the practice has been within the city of London to take for special jurors those only who come within that description. 1 Barn. & Ald. 204. (*a*) As the officer *names* the forty-eight (a practice which obtained before the act of 3 Geo. 2, c. 25, and is authorized by it) he is not bound to take the jurors in sequence as thay stand on the sheriff's books, but is at liberty to make a selection, and with that selection the court will of course not meddle, unless it can be shown that it was made partially and corruptly. R. v. Wooler, 1 Barn. and Ald. 193.‖

If the rule was entered into by consent, it is said to be a contempt in the attorney not to be present. But to remedy any inconveniency from hence, a rule was made, that when a master is to strike a jury, viz., forty-eight out of the freeholders' book, he shall give notice to the attorneys of both sides to be present; and if the one comes, and the other does not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out other twelve for him that is absent.

Salk. 405, pl. 1.

And it is said, that if by rule of court the master is ordered to strike a jury, in case it be not expressed in such rule that the master shall strike forty-eight, and each of the parties shall strike out twelve, the master shall strike twenty-four, and the parties have no liberty to strike out any.

Salk. 405, pl. 2.

It is said, that a special jury may be granted to try a cause at bar without the consent of the parties, but never at *nisi prius*, unless for good cause shown, such as partiality of the sheriff, &c.

8 Mod. 248.

Also, it is said to be contrary to the course of the Court of B. R. in capital cases, to order the clerk of the crown to strike a special jury as is done by the secondary in civil causes upon trials at bar.

2 Jon. 222. There can be no special jury in treason or felony. 21 Vin. Abr. 301, pl. 5.

By the 3 Geo. 2, c. 25, § 15, reciting, that whereas some doubt had been conceived touching the power of his majesty's courts of law at Westminster, to appoint juries to be struck before the clerk of the crown, master of the office, prothonotaries, or other proper officer of such respective courts, for the trials of issues depending in the said courts, without the consent of the prosecutor or parties concerned in the prosecution or suit then depending, unless such issues are to be tried at the bar of the same courts, it is declared and enacted, "That it shall and may be lawful to and for his majesty's Courts of King's Bench, Common Pleas, and Exchequer, at Westminster, respectively, upon motion made on behalf of his majesty, his heirs or successors, or on the motion of any prosecutor or defendant in any indictment or information for any misdemeanor or information in nature of a *quo warranto*, depending or to be brought or prosecuted in the said Court of King's Bench, or in any information depending, or to be brought or prosecuted in the said Court of Exchequer, or on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause, or suit whatsoever depending, or to be brought and carried on in the said Courts of King's Bench, Common Pleas, Exchequer, or in any of them; and the said courts are hereby respectively authorized and required upon motion aforesaid, in

any of the cases afore-mentioned, to order and appoint a jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been and are usually struck in such courts respectively, upon trials at bar had in the said courts; which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue.

From the penning of this act, it appears to extend only to the trial of any issue joined; therefore the court will not grant a special jury upon a writ of inquiry. Mich. 25 Geo. 2, Symonds v. Parminter. [But in such case, the plaintiff may move the court for a rule to have a *good* jury, which is a better sort of *common* jury. Imp. K. B. 407; 5 T. R. 460. And before the introduction of special juries, this rule appears to have been frequently granted for the trial of causes at *nisi prius*. R. v. Smith, 1 Str. 265.] No special jury after common jury process returned. [But in common causes between assizes and assizes, the practice is different. Cross v. Skipwith, Barnes, 449; Dobson v. Stevens, Ibid. 461. Motion for special jury too late after *ven. fa.* and return filed. Clark v. Sheppard, Barnes, 488.] ‖ The rule for a special jury must be served early enough to enable the opposite party to strike the jury before the day of trial; and therefore where the rule was served at six o'clock in the evening preceding the day fixed for the trial, it was holden, that the cause was properly tried by a common jury. Gunn v. Honeyman, 2 Barn. & Ald. 400. If a common jury panel be returned with a special jury panel, and, no special juryman appearing, the cause be tried by a common jury, such trial will be set aside; for the sheriff has no authority to return a common jury panel; he is only directed to return the special jurymen. Holt v. Meddowcroft, 4 M. & S. 467. If after a special jury has been struck, the cause goes off for default of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed. R. v. Perry, 5 T. R. 453.‖

And by § 16 of the said statute it is further enacted, "That the person or party, who shall apply for such jury to be struck as aforesaid, shall bear and pay the fees for the striking such jury, and shall not have any allowance for the same upon taxation of costs."(*a*)

(*a*) [Soon after the passing of this act, it was determined that all the costs of a special jury, except those of striking, must be paid by the party losing. Wilkes v. Eames Andr. 5; 2 Str. 1080, S. C.; Eyles v. Smart, Suppl. to Lill. Pr. Reg. 7. But this giving occasion to applications for special juries in trivial causes, the legislature interposed, and by stat. 24 Geo. 2, c. 18, enacts, that the party applying shall, besides the costs of striking, pay all the expenses occasioned by such special jury, and be allowed only what he would be entitled to, if the trial had been by a common jury; unless the judge shall immediately after the trial certify in open court, under his hand upon the back of the record, that it was a cause proper to be tried by a special jury.] ‖ And by the same statute, § 2, no person, who shall serve on a special jury, shall be allowed or take, for serving on such jury, more than the judge, who tries the cause, shall think just and reasonable, not exceeding one pound and one shilling, except in causes where a view hath been directed.—The certificate cannot be granted under this statute the day after the trial. Waggett v. Shaw, 3 Campb. 316.‖

§ 17. Provided, "That where any special jury shall be ordered, by rule of any of the said courts, to be struck by the proper officer of such court, in the manner aforesaid, in any cause arising in any city or county of a city or town, the sheriff or sheriffs, or under-sheriff of such city, or county of a city or town, shall be ordered by such rule to bring, or cause to be brought before the said officer, the books or lists of persons qualified to serve on juries within the same, out of which juries ought to be returned by such sheriff or sheriffs, in like manner as the freeholders' book hath been usually ordered to be brought, in order to the striking of juries for trials at the bar, in causes arising in counties at large; and in every such case the jury shall be taken and struck out of such books or lists respectively."

A rule was made for a special jury, which was entered into by consent;

and afterwards, when the parties attended the master, the defendant struck out some hundredors, and at the trial challenged the array for want of hundredors, which the judge of assize allowed a good challenge.(*a*) And this was held such a breach and contempt of the rule, that an attachment was granted for it.

R. v. Burridge, 8 Mod. 245; 2 Lord Raym. 1364, S. C.; 1 Str. 593, S. C. (*a*) So in an anonymous case in Style, 233.

But, where in the trial of a *quo warranto*, the defendant challenged the array of a special jury, that had been struck at his request, for partiality in the sheriff, an attachment being moved for, the case next above was relied on, but was denied;(*b*) and it was said *per curiam*, that the attachment in the case *supra* was granted by reason of the abuse of the rule; but here the only foundation is the jury's being so struck at his request, which is not alone sufficient; for he had a right to challenge the array on the process's being directed to a wrong officer, and the rule might have been fulfilled another way, viz., as the sheriff was partial, a proper entry might have been made, and process directed to the coroner.

R. v. Johnson, Mich. 8 Geo. 2, in B. R.; 2 Stra. 1000; 2 Kel. 110; Bull. N. P. 305, S. C., but with *qu.* ‖ (*b*)It was not absolutly denied; the words in Strange's Report are, "The court did not seem to *relish* it; and said it might be an authority in one exactly circumstanced as that was, but in no other." The fullest report of this case is in Lord Raymond, and the circumstances there stated would seem to bear out the decision.‖

By 6 G. 4, c. 50, § 30, it is enacted and declared, that it is and shall be lawful for the Courts of King's Bench, Common Pleas, and Exchequer at Westminster respectively, and for the judges of the said courts of the three counties palatine, and of the courts of great sessions in Wales, upon motion on behalf of the king, or of any prosecutor, relator, plaintiff, or demandant, or of any defendant or tenant in any case whatsoever, whether civil or criminal, or on any penal statute, excepting only indictments for treason or felony, to order and appoint a special jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury in such manner as the said courts have usually ordered the same, and every jury so struck shall be the jury returned for the trial of such issue.

And by § 31, every man described in the jurors' book for any county in England or Wales, or for the county of the city of London, as an esquire or person of higher decree, or as a banker or merchant, shall be qualified and liable to serve on special juries; and the sheriff in every county in England and Wales, or his under sheriff, and the sheriffs of London or their secondary, shall, within ten days after the delivery of the jurors' book for the current year, to either of them, take from such book the names of all men described therein as esquires, or persons of higher decree, or as bankers or merchants, and cause the names of all such men to be fairly copied out in alphabetical order, with their places of abode and additions, in a separate list to be subjoined to the jurors' book, which list shall be called "the special jurors' list," and shall prefix to every name in such list its proper number, beginning the numbers from the first name, and continuing them in a regular arithmetical series down to the last name, and shall cause the said several numbers to be written upon distinct pieces of parchment or card, being all as nearly as may be of equal size; and after all the said numbers shall have been so written, shall put the same together in a separate drawer or box, and

shall there safely keep the same to be used for the purpose hereinafter mentioned.

And by § 32, whenever any of the courts or judges above mentioned shall order a special jury to be struck before the proper officer, such officer shall appoint a time and place for the nomination of such special jury; and a copy of the rule of court, and of such officer's appointment, shall be served on the under-sheriff of the county in England or Wales in which the trial is to be had, or on the secondary of the city of London if the trial is to be had there, and also on all the parties who have usually been served with the same, in the accustomed manner; and the said officer at the time and place appointed, being attended by such under-sheriff or secondary, or his agent, who are hereby required to bring with them the jurors' book and such special juror's list; and all the numbers so written on distinct pieces of parchment or card as aforesaid, shall in the presence of all the parties in any of the cases aforesaid, and of their attorneys, (if they choose to attend, or if the said parties or their attorneys all or any of them do not attend, then in their absence,) put all the said numbers into a box to be by him provided for that purpose, and after having shaken them together, shall draw out of the said box 48 of the said numbers one after another, and shall, as each number is drawn, refer to the corresponding number in the special jurors' list, and read aloud the name designated by such number; and if at the time of so reading any name, either party or his attorney shall object that the man whose name shall have been so referred to, is in any manner incapacited from serving on the said jury, and shall also then and there prove the same to the satisfaction of the said officer, such name shall be set aside, and the officer shall instead thereof draw out another number, and in like manner refer to the corresponding number in the list, and read aloud the name designated thereby, which name may be in like manner set aside, and other numbers and names shall in every such case be resorted to, according to the mode of proceeding herein-before described for the purpose of supplying names in the places of those set aside, until the whole number of 48 not liable to be set aside shall be completed; and if in any case it shall so happen that the whole number of 48 cannot be obtained from the special jurors' list, in such case the said officer shall indifferently take according to the mode of nomination heretofore pursued in nominating special juries, such a number of names from the general jurors' book, in addition to those already taken from the special jurors' list, as shall be required to make up the full number of 48 names, all and every of which 48 names shall in such case be equally deemed and taken to be those of special jurors; and the said officer shall make out for each party a list of the 48 names, together with their respective places of abode and additions, and after having made out such list, shall return all the numbers so drawn out, together with all the numbers remaining undrawn, to such under-sheriff or secondary, or his agent, to be by such under-sheriff or secondary safely and securely kept for future use; and all the subsequent proceedings for reducing the said list, and all other matters whatsoever relating to special juries, shall remain and continue in force as heretofore, except where the same or any part thereof is expressly altered by this act, and all the fees heretofore payable on the striking of special juries, shall continue to be paid in the accustomed manner.

By § 33, it is provided, that nothing herein contained shall be construed to prevent the parties in any cause, or their attorneys, from consenting

to have a special jury nominated according to the mode used before the passing of this act; and upon a consent to that effect, signed by each party or his attorney, being communicated to the proper officer, he is hereby authorized and required to nominate a special jury for the trial of every such cause, according to the mode used before this act: provided also, that nothing herein contained shall be construed to prevent the same special jury, however nominated, from trying any number of causes, so as the parties in every such cause, or their attorneys, shall have signified their assent in writing to the nomination of such special jury for the trial of their respective causes: provided always, that it shall be lawful for the court, if it shall so think fit, upon the application of any man who shall have served upon one or more special juries at any assizes or sessions of *nisi prius*, to discharge such man from serving upon any other special jury during the same assizes or sessions of *nisi prius*.

By § 34, the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than he would be entitled unto in case the cause had been tried by a common jury, unless the judge before whom the cause is tried shall, immediately after the verdict, certify upon the back of the record, that the same was a cause proper to be tried by a special jury.

By § 35, no juror, who shall serve upon a special jury, shall be allowed or take for serving on any such jury more than such sum of money as the judge who tries the issue shall think just and reasonable, and which shall not exceed the sum of 1*l.* 1*s.*, except in causes wherein a view is directed and shall have been had by such juror.

By § 36, it is provided, that where any special jury shall have been ordered, by any rule in any of the courts aforesaid, to be struck by the proper officer of such court, in any cause arising in any county of a city or town except the city of London, the sheriff or sheriffs thereof, or the under-sheriff shall be commanded by such rule to bring before the proper officer of such court, the books or lists of persons qualified to serve on juries within the same county of a city or town; and in every such case the jury shall be taken and struck out of such books or lists respectively, in the manner heretofore accustomed.||

(E) Who are to be returned: And herein of the Qualifications and several Causes for which they may be challenged: And,

1. *Of Challenges to the Array or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge or to the Favour.*

A CHALLENGE (*a*) to jurors is twofold; either to the array, or to the polls, *i. e.* to the particular jurors; to the array of the principal panel, and to the array of the *tales*. And herein my Lord Coke observes, that the jurors' names are ranked in the panel one under another, which order or ranking the jury is called the array; as in common speech we say *battail array* for the order of battle; so as to challenge the array of the panel, is at once to challenge or except against all the persons so arrayed or empannelled, in respect of the partiality or default of the sheriff, coroner, or other officer who made the return.

Co. Lit. 156 a. (*a*) For the several significations of the word *challenge*, vide Co. Lit. 155 b.

This kind of challenge is twofold, either a principal cause of challenge, or to the favour, like that to the polls or particular jurors; for it was thought there could be no better rule to ascertain what should be a proper challenge to the officer, than what was a proper challenge to each juror's partiality; for it was not supposed that there was a jury *per quos rei veritas melius sciri poterit*, unless they were settled by a person absolutely indifferent.

Co. Lit. 156.

β A challenge to the array will not be allowed on the ground, that in the selection of grand jurors, all persons belonging to a particular fraternity or association were excluded, if those who are returned are unexceptionable, and possess the qualifications required by the statute.

The People v. Jewett, 3 Wend. 314.*g*

A principal [cause of challenge] is grounded on such a manifest presumption of partiality, that if it be found true it unquestionably sets aside the array or the juror, but a challenge to the favour leaves it to the discretion of the triers.

Co. Lit. 156. β The triers are to decide whether the juror challenged stands indifferent between the parties. Mechanics' Bank v. Smith, 19 Johns. 115.*g*

There are many principal causes of challenge to the array; as, if the officer return any juror at the party's domination; or that he may be more favourable to one party than the other; or if the array be returned by a bailiff of a franchise, and the sheriff return it as of himself; in which case the party should lose his challenges on a default in the bailiff, because the return on record is in the sheriff's name. But, if the sheriff return one within a liberty, this is good, and the lord of the franchise is put to his action against him.

Co. Lit. 156.

If the sheriff be liable to the distress of either of the parties mediately or immediately; or if he be his servant or officer in fee, or of robes; or his (*a*) counsellor or attorney; or have part of the land depending on the same title; or if he has been godfather to a child of either of the parties, or either of them to his; or either of them have an action of debt against him; or if an action of battery, or such like, which imply malice, are depending between them, these are principal challenges to the array.(*b*)

Co. Lit. 156; Tri. per Pais, 166. β A tenant who holds land from year to year, as a cropper, is disqualified as a juror in an action to which his landlord is a party. Pipher v. Lodge, 16 S. & R. 214.*g* (*a*) But by Finch's Law, 402, these are challenges to the favour only. [(*b*) Action of debt to recover the penalty of a by-law calculated to exclude strangers from trafficking in the city of Chester. The by-law limited the cause to be tried before the local jurisdiction there; one-third of the penalty was allotted to poor prisoners; one other third to the informer; and the remaining third was not subject to any particular disposition. The array was challenged because the local sheriffs who empannelled it, were citizens and freemen of Chester; and the polls were challenged, because the jurors were also freemen. Both these objections were overruled by the portmote court of that city, but that judgment was reversed in the court of Great Sessions, and the reversal affirmed in the King's Bench. Hesketh. v. Braddock, 3 Burr. 1847. See the form of the challenge. 3 Wooddes. 340.]

But, if either of the parties be subject to the distress of the sheriff, &c., or if the sheriff, &c., have an action of debt against either of the parties, these are causes of challenge to the favour only; for the sheriff, &c., thereby is not under the party's influence, but the party under his.

Co. Lit. 156. β See Gardner v. Turner, 9 Johns. 260; Woods v. Rowan, 5 Johns. 133.*g*

Consanguinity, how remote soever, between the sheriff or juror and either of the parties, or affinity by marriage of either party himself with the cousin of the sheriff or the juror, or *e converso*, are principal causes of challenge to the array, or to the polls. But, if the marriage be between the son of the one and the daughter of the other, it is a cause of challenge to the favour only; and he, that challenges the array or a juror for a cousinage, must show how the party is cousin. But, if it be found that he is cousin, it is (*a*) sufficient, whether it be found in the manner alleged or not. And here my Lord Coke notes, that a bastard can have no kindred.

Co. Lit. 156. [In the case of Mounson v. West, 1 Leon. 88, it was argued, that affinity was a challenge to the *favour* only; and to this two judges inclined at first; but after time taken to consider the point, it was adjudged to be a *principal* challenge by three judges, the fourth (Perjam, J.) hesitating. From this case these two positions may be inferred: that having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity: that it is not necessary that the issue should be inheritable to the land, where land is the subject of the action. Co. Lit. 156 a, n. 2, 13th edit.] (*a*) That being cousin, though in 8th or 9th degree, is sufficient. Dyer, 319 a, pl. 13; Owen, 44. *β* It is sufficient cause to challenge the array, that the sheriff is the brother of one of the parties. Munshower v. Patton, 10 S. & R. 334. See Pipher v. Lodge, 16 S. & R. 214; Rank v. Shewey, 4 Watts, 218; Denn v. Clark, 1 Coxe, 446; Jones v. Butterworth, 2 Penning. 456.*g*

That the sheriff and one of the parties are fellow-servants, not a principal cause of challenge, but only to the favour.

Dyer, 367, pl. 40. *β* It is a good cause of challenge to the array, that the sheriff, who assisted in selecting the jurors, is a brother of one of the parties. Munshower v. Patton, 10 S. & R. 334.*g*

It has been doubted whether the (*b*) lessor in ejectment, being of kin to the sheriff in such a manner as to make it a principal cause of challenge, in case he had been plaintiff or defendant, be a principal cause of challenge. And by some it hath been holden a principal cause, for though this is but a fictitious action, yet the lessor only being concerned in interest, and the plaintiff a fictitious person, the courts take notice of the lessor as the real plaintiff, by ordering him in certain cases to pay costs, &c. But the better opinion is, that it is no principal cause of challenge; that he not being party to the record, the judges *ex officio* are not obliged to take notice of him, and that to do it in this case would tend to delay, which the courts always avoid.

Eyre v. Banister, Moore, 894; Hutt. 25, S. C.; Guest v. Bridgman, 1 Ro. Rep. 328; Harebotle v. Placock, Cr. Ja. 21; Lessee of Kingston v. Tenant of Earl of Bridgewater, cited in Cr. Ja. 547. ‖ According to Moore's report of the case of Eyre v. Banister, the judges all agreed, that if it had been avowed that the lease was to try the title, and that the action was carried on at the expense of the lessor, and this had appeared by proof to the court, in that case it would be a principal cause of challenge; but not without such an averment.‖ (*b*) It is said, that where the defendant justifies as servant to J S, and that the land is the freehold of J S, it is a principal challenge that a juror is within the distress of J S, for that the title is to be tried. Hutt. 25.—But in this case of an ejectment it has been held, in the House of Lords, in the case of Holborn v. Babington, 1719, that the lessor of the plaintiff, being a peer, and no knight returned, was no cause of challenge, because he did not appear to be party to the record. 2 Br. P. C. 114; Vin. Abr. tit. *Trial*, (H. c.) p. 8.—And the S. P. was resolved Mich. 9 Geo. 2, between Grimston, lessee of Lord Gower, and Gardner; and vide Skin. 229, pl. 8, S. P. See now 24 Geo. 2, c. 18, § 4.

The array of a panel was challenged *ore tenus*, because it was returned by the sheriff two days after he had received a writ of discharge. And it was said *per cur.* that it could not be challenged for that cause, because it would be a direct averment against the record, for it is returned by him as

sheriff, and the return accepted. But by the advice of the court the party made his challenge to the array, because it was favourably made, and returned in favour of the party, &c., and issue being joined thereupon, and all this matter given in evidence, the court directed the triers, that it was not duly made and returned, for it was without warrant, whereupon the array was quashed.

Cro. Eliz. 369, Hore v. Broom.

But, where a challenge to the array was taken, because the sheriff who made the return had continued in his office for more than three months, and not taken the oaths, and subscribed the declaration required by the act 25 Car. 2, c. 2, made for preventing the dangers by popish recusants; and so his office, by that act, was void to all intents and purposes before he made his return of the jury; this challenge was disallowed by the court, for he must be taken here as sheriff *de facto;* and if such a challenge should be allowed, no trial could be had, but should be put off, unless the party were ready to show that the sheriff had taken the test.

2 Vent. 58, in the case of the Sheriff of Bucks.

The plaintiff for his expedition of trial surmised that he was servant to the sheriff of the county where the action was brought and triable, and prayed a *venire facias* to the coroners, and the defendant *non dedixit;* whereupon process was awarded to the coroners; and after trial, and verdict for the plaintiff, it was moved, that this process was misawarded, and a mistrial; for process ought not to be awarded to the coroners but where the challenge is principal; and here to say that he was servant to the sheriff, is no principal challenge, but only to the favour, wherefore, &c. But the court held, forasmuch as if the sheriff had returned this panel, it had been a good cause to quash the array for favour, (*a*) that the plaintiff to avoid that delay might well show it, and have process to the coroners; and the rather, this being a (*b*) judicial and not an original writ; and the clerks said, there were many precedents accordingly.

Cro. Eliz. 581, Chamber v. Matthew. (*a*) But in Symonds v. Walsh, Cro. Ja. 547, S. P. cited, and seems adjudged *contra.* ‖ But *qu.* the case of Symonds v. Walsh, as the decision seems to have proceeded upon the authority of a case in ejectment, which is materially different, as we have seen in Eyre v. Banister, *supra*, 344.‖ (*b*) Vide Plow. 74.

If the challenge to the array be found against the party, he shall have his challenge to the polls; but neither party shall take a challenge to the polls, which he might have had to the array.

Co. Lit. 156 b, 157 b.

‖ It seems, that a party cannot challenge the array, because the sheriff is concerned in interest with him in the event of the cause. But, if he does, and there is a demurrer *instantèr* to that challenge, and before it is determined, the other party, for the sake of expedition, moves to quash the array, the court will do it without the consent of the party challenging.

Kynaston v. Mayor, &c. of Shrewsbury, Andr. 85, 104.

By the late jury act, the qualification required by the 3 G. 2, c. 25, § 18, and 4 G. 2, c. 7, is altered; and any person having in his own name or in trust for him 10*l.* by the year in freehold, copyhold, or customary lands in fee-simple, fee-tail, or for life, or having an estate of 20*l.* per annum above reprizes, in lands or tenements held by lease for the term of twenty years or more, or for any term determinable on life or lives, or any householder as-

sessed to the poor rate or the inhabited house duty in the county of Middlesex on a value of 30*l.*, or in any other county of 20*l.*, or who shall occupy a house containing not less than fifteen windows, is qualified to serve. In Wales three-fifths of any of the above qualifications will suffice.

By 6 G. 4, c. 50, § 1, Persons above the age of sixty are not liable to serve (the age was seventy under the statute of Westminster 2, 38.)

By § 50, no man shall be returned by the sheriffs of London as a juror to try any issue joined in his majesty's courts at Westminster, or to serve on any jury at the sessions for the said city, who is not a householder or occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, and has lands, tenements, or personal estate to the value of 100*l.*

§ 42. No person need serve as a juror at any session of *nisi prius*, or jail-delivery in the county of Middlesex, who has the sheriff's certificate of service at either of such sessions, for either of the two terms or vacations next preceding. Certificate of service within one year in Wales, the counties of Hereford, Cambridge, Huntingdon, and Rutland, within four years in the county of York, or two years in any other county, will exempt a man from serving on trials before any court of assize, *nisi prius*, *oyer* and *terminer*, or jail-delivery. The exemptions are the same with regard to quarter sessions, except that two years, instead of four, will exempt in the county of York. The above provisions are not to extend to grand juries at the assizes or great sessions, or to special jurors.

By § 39, the sheriff shall be indemnified for empannelling and returning any man named in the jurors' book, although not qualified or liable to serve on juries; and if any sheriff, &c., shall wilfully empannel and return any man to serve on any jury, (except grand juries,) whose name is not inserted in the jurors' book of the current year, or if such book has not been delivered, then in the jurors' book of the last year; or if any clerk of assize, associate, prothonotary, clerk of the peace, or other officer, shall wilfully record the appearance of any man so summoned and returned, who did not really appear, in every such case the court shall, on examination, set such fine on such sheriff, &c. &c., as shall seem meet.

There can be no challenge to the array on the ground of unindifferency in the master of the crown office, he being the officer of the court expressly appointed to nominate the jury. The only remedy is to apply to the court to appoint some other officer to nominate.

Rex v. Edmonds, 4 Barn. & A. 471.

The sheriff's officer had neglected to summon one of the twenty-four special jurymen: held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff.

Rex v. Edmonds, 4 Barn. & A. 471.

No challenge can be taken, either to the array or the polls, until a full jury have appeared.

Rex v. Edmonds, 4 Barn. & A. 471.

The disallowing a challenge is not a ground for a new trial, but for a *venire de novo;* and every challenge must be propounded in such a way as that it may be put at the time on the *nisi prius* record, so that the adverse party may either demur, or counterplead, or deny the matter of challenge; in which last case only triers are to be appointed. Where the challenges were not put upon the record, the defendants were held not in a condition

to ask the opinion of the Court of King's Bench as a matter of right upon their sufficiency.

Rex v. Edmonds, 4 Barn. & A. 471.

It is not competent to ask jurymen, whether special or talesmen, if they have not, previous to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but such expressions must be proved by extrinsic evidence.

Rex v. Edmonds, 4 Barn. & A. 471.

It seems that, by the proviso in the twenty-seventh section of 6 G. 4, c. 50, alienage is not now a ground of challenge to a *special* juror.

Rex v. Sutton, 8 Barn. & C. 417.‖

2. *Where Insufficiency and not being* Liber Homo *is a good Cause of Challenge to the Polls.*

A challenge to the polls is, as has been observed, a challenge to the particular jurors, who, it seems, of old could not be challenged; for these by the feudal law, as the *pares curtis*, were the judges; and therein the rule was *pares qui ordinariam jurisdictionem habent recusari non possunt.* But, though those suitors, as judges of the court, could not be challenged, yet the *pares*, when brought up by writ, were subject to be challenged. And the reason is, that there are several qualifications required by the writ, viz.: that they be *liberi et legales homines de vicineto* (of the place laid in the declaration) *quorum quilibet habeat decem libras terrar. tenementor. vel reddit. per ann. ad minus, per quos rei veritas melius sciri poterit, et qui nec* (of the plaintiff nor defendant) *aliquâ affinitate attingunt, ad faciend. quand. jurat patriæ inter partes prædict.* These qualifications were inserted, because this manner of trial was different from that below; for there, the trial being by all the *pares*, if there was a majority amounting to twelve, the cause was decided by such a number as were necessary; but here, because they brought up but twelve, and they were all to be of one mind, in order to make the verdict, therefore, it was necessary there should be several qualifications mentioned in such persons who are to give in the verdict in that cause; and if any of the qualifications were wanting in any one, it was a sufficient reason to reject such person.

Fortes. Laud. Leg. Ang. c. 25; 2 Inst. 27. ß Vide Hollingsworth v. Duane, 4 Dall 353.ƒ Vide *post.*

The first qualification is, that they should be *liberi et legales homines* Hence it has been always clearly holden, that aliens, minors, or villeins, cannot be jurors.

Co. Lit. 156 b, 155 b, 172 b; 7 Co. 18, in Calvin's case, 2 Roll. Abr. 656. ß State v. Quarrel, 2 Bay, 150.ƒ

Also, infamy is a good cause of challenge to a juror; as that he is outlawed,(*a*) or that he hath been adjudged to any corporal punishment whereby he becomes infamous,(*b*) or that he hath been convicted of treason or felony, or perjury,(*c*) or conspiracy, or of forgery on 5 Eliz. c. 14, or attainted in an attaint for giving a false verdict. And it hath been holden, that such exceptions are not solved by a pardon. And it was anciently holden, that excommunication was also a good challenge. Yet it seems that none of the above-cited challenges are principal ones, but only to the favour, unless the record of the outlawry, judgment, or conviction be produced, if it be a record of another court; or the term, &c., be shown, if it be a record of the same court.

Co. Lit. 6 b, 155 b, 158 a; 2 Roll. Abr. 649; 1 Lev. 263; Raym. 380; Hal. Hist

(E) Who are to be returned, &c

P. C. 303; 2 Hawk. P. C. c. 43, § 25; 2 Bulstr. 154. (*a*) [But *qu.* whether outlawry in a *personal* action be sufficient to disqualify. Cro. Car. 134; W. Jon. 198, S. C.] (*b*) According to modern cases, it is not the infamy of the punishment, but of the crime, which incapacitates. 2 Wils. 18. ‖ (*c*) According to the rule expressed in the English of those days; "*He ne es othes worthe that es enes gylty of oth broken.*" Bract. lib. iv. tr. 1, c. 19.‖

The *venire facias* was *probos et legales homines;* and it was objected, that it ought to have been (*a*) *liberos et legales homines*, there being a difference between *probus*, *liber et legalis;* for that *legalis* is he who is not outlawed, and against whom no exception can be taken in this behalf; that *probus* is not taken notice of in law; and *liber homo* is not only one that hath freehold land, but that hath freedom of mind, and stands indifferent, no more inclining to the one than to the other. But it was adjudged that *probos et liberos* are of one sense, and that the statute of Westminster 2, which gives the *venire* does not tie the writ to the very words.

Raym. 417, Attorney-General v. Blood *et al.*; Keb. 563, S. C. (*a*) *Libros* for *liberos* in the *venire* amended after verdict. Cro. Eliz. 618.

3. *Where the Want of a Freehold, or competent Estate, is a good Cause of Challenge.*

It seems to be admitted by the statute of 21 E. 1, *de his qui ponendi sunt in assisis*, and also by the register, that at common law there was no necessity that jurors should have any freehold as to inquests before justices in *eyre*, or in cities or burghs; for it seems, that in corporations the freedom, and not the freehold, made them *liberos homines.*

Raym. 485; Vent. 366.

Also, it seems agreed, that the common law doth not require that a juror should in any case have a freehold of any certain value; and upon this ground it hath been adjudged, that a freehold worth but 20*s.* or 5*s.* or even 1*d.* is still a sufficient qualification for a juror in such cases as are not within the statutes, which require a freehold of greater value.

Keilw. 46; Cro. Eliz. 413; 2 Hawk. P. C. c. 43, § 12; 2 Hal. Hist. P. C. 272. ‡ In North Carolina, freeholders in another state, owning no land in that state, are not qualified. Sheepshanks v. Jones, 2 Hawks, 211; State v. Greenwood, 1 Hayw. 141.‡

Also, by some opinions it is holden, that the common law did not require that a juror should in any case have a freehold. But this is not only contrary to what seems implied by the books, which, in saying that the common law did not require a freehold of any certain value, plainly suppose that it required some freehold, but hath been also contradicted by many express authorities; agreeably to which it seems to be settled at this day, that the want of a freehold is a good challenge of a juror in all cases not otherwise provided for by statute, and, consequently, in a trial for high treason in London, as well as in any other county.

2 Hawk. P. C. c. 43, § 12, and the authorities there cited. State Trials, vol. 6, 58; Francia's case, fol. 245, Layer's case.

But it seems agreed, that wherever the letter of the common or statute law requires that a juror should have a freehold, the meaning is fully satisfied by his having the use of a freehold; and that it is not material whether he have it in his own or his wife's right; or whether it be absolute or upon condition; or an estate of inheritance, or only for term of one's own or another's life; so that it be in the same county wherein the suit is brought, and actually continue in the juror till the time when he is sworn.

Keilw. 46, p. 2, 92, pl. 5; Dyer, 9, pl. 26; Co. Lit. 156 b, 157 a, 272; Plow. 58 a; 2 Roll. Abr. 648.

(E) Who are to be returned, &c.

But this matter, as to the freehold and value of jurors, has been regulated and settled by divers statutes; to which purpose, by the statute of Westm. 2, c. 38, ‖ it was ordained, that no one should in future be (*a*) put on juries or lesser assizes, who had not some freehold of the value of 20*s*. *per annum* within the county where the assize or jury was to be taken, or of 40*s*. without; unless they were witnesses to charters, or other writings, whose presence was absolutely necessary; and the 21 E. 1, st. 1, *de his qui ponendi sunt in assisis*, requires those who were in juries out of their counties (which was the case in trials at the bar of the courts at Westminster) to have lands or tenements of 100*s*. *per annum*, and those within the county of 40*s*.; those before justices assigned, or other ministers of the king appointed, to take inquests, juries, or other recognitions, 40*s*. *per annum;* but as to those before the justices itinerant, and in cities, boroughs, and other mercantile towns, they were to remain as at common law.

(*a*) In the construction hereof it has been holden, that a juror can neither be challenged by the parties for being returned contrary to these acts, nor allege such matter himself for his discharge, but must take his remedy by action against the sheriff, or by writ of privilege, for his discharge. 2 Inst. 448.‖

β If a petit juror was qualified by being a freeholder when his name was put in the jury box, his divesting himself of his freehold before he was drawn and summoned cannot be taken advantage of after verdict.

Orcutt v. Carpenter, 1 Tyl. 250.β

By the 2 H. 5, st. 2, c. 3, it is enacted, "That no person shall be admitted to pass in any inquest upon trial of the death of a man, nor in any inquest betwixt party or party, in plea real or plea personal, whereof the debt or the damage declared amount to forty marks, if the same person have not lands or tenements of the yearly value of 40*s*. above all charges of the same, so that it be challenged by the party, that any person so empannelled in the same cases hath not lands or tenements of the yearly value above the charges, as afore is said."

[This seems extended to 4*l*. by 27 El. c. 6.]

It hath been (*b*) holden, that this statute extends as well to collateral issues as to the general one; but (*c*) that it doth not extend to an indictment or information for a crime not capital.

(*b*) Keilw. 92. (*c*) Cro. Eliz. 413.

It has been holden, that a feoffee to the use of another, or one who has only a dry remainder, are not qualified to be jurors within the meaning of those statutes, because, whatsoever the value of the lands may be, they have no income from them.

2 Roll. Abr. 647; Keilw. 92; 3 Mod. 149.

By the 23 H. 8, c. 13, "Every person and persons, being the king's natural subject born, which either by the name of a citizen, or of a freeman, or any other name, doth enjoy and use the liberties and privileges of any city, borough, or town corporate, where he dwelleth and maketh his abode, being worth in movable goods and substance to the clear value of 40*l*., shall be admitted in trial of murders and felonies in every sessions and jail-delivery to be kept and holden in and for the liberty of such cities, boroughs, and towns corporate, albeit they have no freehold. But this act shall not extend to any knight or esquire in such city, &c."

(E) Who are to be returned, &c.

Special provision is made by 11 H. 7, c. 21, and 4 H. 8, c. 3, for jurors in London in real and personal actions above the value of forty marks.

By the 1 R. 3, c. 4, a juror in the torn was to have 20*s.* freehold, and 1*l.* 6*s.* 8*d.* copyhold.

By the 4 & 5 W. & M. c. 24, § 15, it is enacted, "That all jurors (other than strangers upon trials *per medietatem linguæ*) who are to be returned for trials of issues joined in any of the Courts of King's Bench, Common Pleas, or Exchequer, or before justices of assize or *nisi prius*, *oyer* and *terminer*, jail-delivery, or general quarter-sessions of the peace in any county of this realm of England, shall every of them have in their own name, or in trust for them within the same county, ten pounds by the year, at least, above reprises, of freehold or copyhold lands or tenements, or of lands and tenements of(*a*) ancient demesne, or in rents, or in all or any of the said lands, tenements or rents in fee-simple, fee-tail, or for the life of themselves, or some other person; and that in every county of the dominion of Wales, every such juror shall have within the same county six pounds by the year, at least, in manner aforesaid, above reprises. ‖ All which persons having such estates as aforesaid, are hereby enabled and made liable to be returned and serve as jurors for the trial of issues before the courts and justices aforesaid; any law or statute to the contrary in anywise notwithstanding. And if any of a lesser estate and value shall be respectively returned upon any such jury, it shall be a good cause of challenge, and the party returned shall be discharged upon the said challenge, or upon his own oath of the truth of the said matter.

(*a*) But by the common law, a freehold in ancient demesne was not sufficient. Co. Lit. 156 b.‖

Provided by § 18, 19, that it shall be lawful to return any person on a *tales* in England who shall have 5*l.* by the year, or in Wales who shall have 3*l.* by the year, in manner aforesaid.

In this statute, as also in the statutes 27 Eliz. c. 6, and 16 & 17 Car. 2, c 3, § 2, there is a saving to all cities, boroughs and towns corporate, of their ancient usages; from whence it hath been settled, that trials in those places continue as before, or as prescribed by the 23 H. 8, c. 13, which requires jurors to be worth 40*l.* in goods, &c., lest there should be a failure of justice, it being generally impracticable to get a sufficient number of such freeholders as the statutes require in towns. But it has been agreed, that for trials in London for(*b*) high treason, every juror ought to have such freehold or copyhold as is required by 4 & 5 W. & M. c. 24.

Vent. 366; Skin. 91, pl. 8. (*b*) State Trials, vol. 6, fol. 58, Francia's trial.

By the 3 Geo. 2, c. 25, § 18, it is enacted, "That any person or persons having an estate in possession in land, in their own right, of the yearly value of 20*l.* or upwards, over and above the reserved rent payable thereout, such lands being held by lease or leases for the absolute term of 500 years, or more, or for 99 years, or any other term, determinable on one or more life or lives; the names of every such person or persons shall and may, and are hereby directed and required to be inserted in the respective lists, in order to their being inserted in the freeholders' book; and the persons appointed to make such lists are hereby directed to insert them accordingly; and such leaseholder or leaseholders shall and may be summoned or empannelled to serve on juries, in like manner as freeholders may be summoned and empannelled, by virtue of this or any other act or acts of parliament for

that purpose, and be subject to the like penalties for non-appearance; any law, &c.

And by § 19, it is further enacted, "That the sheriffs of the city of London for the time being, shall not empannel or return any person or persons to try any issue joined in any of his majesty's Courts of King's Bench, Common Pleas, and Exchequer, or to be or serve on any jury at the sessions of *oyer* and *terminer*, jail-delivery, or sessions of the peace, to be had or held for the said city of London, who shall not be a householder within the said city, and have lands, tenements, or personal estate, to the value of 100*l.* and the same matter and cause alleged by way of challenge, and so found, shall be taken and admitted as a principal challenge; and the person or persons so challenged shall and may be examined, on oath, of the truth of the said matter.

And by § 20, it is further enacted, "That the sheriffs, or other officers, to whom the returning of juries doth or shall belong, for any county, city, or place respectively, shall not empannel or return any person or persons to serve on any jury for the trial of any capital offence, who at the time of such return would not be qualified in such respective county, city, or place, to serve as jurors in civil causes for that purpose; and the same matter and cause alleged by way of challenge, and so found, shall be admitted and taken as a principal challenge; and the person or persons so challenged shall and may be examined on oath, of the truth of the said matter."

By the 4 Geo. 2, c. 7, reciting "That whereas by the very frequent occasions there are for juries in the county of Middlesex, and by the small number of freeholders that are in the said county, the sheriffs of the said county may be under difficulties in procuring juries to answer the purposes of the act; for remedy thereof it is enacted, That all leaseholders upon leases, where the improved rents or value shall amount to fifty pounds or upwards *per annum*, over and above all ground-rents, or other reservations, payable by virtue of the said leases, shall be liable and obliged to serve upon juries, when they shall be legally summoned for that purpose; any thing in this or any former act to the contrary, &c."

1. *Where the Jury's not being convened from a right Place is a good Cause of Challenge.*

The jury is regularly to come from that county in which the matter is alleged to arise, and anciently from the vicinity or very hundred, pursuant to that maxim, *vicini vicinorum facta præsumuntur scire;* persons living in the neighbourhood being esteemed the most proper judges of the facts done within its limits, as being most likely to be proved by witnesses, and charged upon persons with whose integrity and reputation they are best acquainted.

Vide 2 Hawk. P. C. c. 23, § 92, c. 40, § 1. Vide tit. *Actions Local and Transitory.* 5 Mod. 405.

But, if a declaration contains matters lying in two counties that join, the jury may come out of both counties, because the sheriffs may be supposed to meet on the bounds of each county, and empannel the *pares* there. But, if the counties cannot join, and, consequently, the sheriffs cannot meet each other in order to empannel, as if the issue were, whether a road from London to York, and from York to London, &c., this may be tried in either county

2 Roll. Abr. 601, 603.

So, it is said, that if a man forge a deed in one county, and publish it in

another, the trial shall be by a jury of both counties; for that the writing, as well as the publication of that writing, is material.

5 Mod. 223.

A party jury of the counties of Bedford and Hertford came to the bar, and first was sworn one of one county, and another of the other county, and so on in order, till one of the county of Bedford was challenged, and then the court proceeded to the next of that county till one was sworn, and so of the other county, until six of each county were sworn, for if there should be six sworn of the county first, and six of the other afterwards, it were disorderly and (*a*) erroneous.

Hob. 330; 2 Brownl. 272. (*a*) If the issue be to be tried by two counties, and one full inquest appear of one county, but the inquest remain for default of jurors of the other county, a *tales* shall be awarded to the county where the default is, not to the other. Trials per Pais, 69.

If the jury did not come from the hundred, it was a good cause of challenge to the array, and it seems that originally they were (*b*) all obliged to be of the hundred. This was changed by statute, and they were settled first at (*c*) six, afterwards at (*d*) two, from the difficulty of getting hundredors, and the partiality they found amongst them, neighbours having generally a particular attachment to one party more than the other.

Co. Lit. 157 a; Hard. 228; Tri. per Pais, 185; 21 Vin. Abr. 217. (*b*) It is said, that upon indictments of treason or felony, the prisoner pleading not guilty, there ought at common law to be four hundredors returned, the statutes requiring six, two hundredors not extending to treason or felony.—But my Lord Hale says that he never knew any challenge for default of hundredors upon a trial of an indictment for felony or treason. 2 Hal. Hist. P. C. 272. (*c*) By 35 H. 8, c. 6. (*d*) By 27 Eliz. c. 6.

And as the jury was to come from the hundred, it was necessary to lay the *venue* from some known place where the fact was supposed to be done; as in a vill, castle, manor, forest; because, if it was not a known place, there could be no proper direction to the sheriff who were the *pares* that were to try the fact there. It has been holden, that a street or lane is no proper place for a *venue*, because it is not supposed to be sufficiently known to the sheriff in what hundred it is; but a street in a parish is a proper *venue*, because it is sufficiently known in what hundred the parish is.

For this vide 2 Hawk. P. C. c. 23, § 92.

If the lord of the hundred be a party, then it is sufficient they should come from the next hundred.

Co. Lit. 157 a.

So, if an action be brought on the statute of Winton, there, from the apparent partiality, the jury must come from the next hundred where the robbery was committed; for the proper *pares* for the trial of every fact are the nearest (*e*) impartial men to the place where the fact was done.

2 Roll. Abr. 596. (*e*) It is said, that no inhabitant of a county ought to be juror for the trial of an issue, whether the county be bound to repair a bridge or not. 6 Mod. 307. [In such case, the trial shall be in the next county. 2 Burr. 859, 860.]

He that takes such a challenge must show in what hundred the visne lies, and he must take it before so many are sworn as will serve for the hundred, and he that is challenged for the hundred shall not be drawn absolutely, but shall remain *præter* H, (that is,) besides for the hundred.

Co. Lit. 157 a, 158 a; Dyer, 231, pl. 3. β When the record states the jurors to be householders of the county, their residence therein will be presumed. Hudson v. The State, 1 Blackf. 318. γ

If a person dwell in the hundred, whether he have any freehold there or

not; or if he had a freehold there when he was returned, and sell it before he appear; he is a good hundredor. But, if he sell all his freehold, he may be challenged absolutely.

Co. Lit. 157 a.

If divers hundreds are in a leet; or if the cause of action arose in divers hundreds; the hundredors may come from any of them.

Co. Lit. 157 a.

And now by the 4 Ann. c. 16, § 6, 7, no hundredors are required except in prosecutions criminal, and on penal statutes, nor by 24 Geo. 2, c. 18, § 2, in trials of issues on penal statutes.

|| And by the wool act, 28 G. 3, c. 38, § 74, for the better and more impartial trials of all actions and informations which shall be commenced and prosecuted by virtue of that act, such actions and informations shall be tried in any of his majesty's courts of record by a jury of good and lawful freeholders to be summoned out of any other county than that wherein the fact shall be committed.||

5. *Where Partiality in the Juror is a good Cause of Challenge; and therein where it shall be said a principal Cause of Challenge, or to the Favour.*

Jurors ought to be *omni exceptione majores*, and by the words of the writ such *per quos rei veritas melius sciri poterit, et qui nec* the plaintiff, *nec* the defendant, *aliquâ affinitate attingunt.* Which words contain all causes of objection from partiality or incapacity, consanguinity, and affinity; therefore, if the juror be under the power of either party; as, if counsel, servant of the robes, or tenant, he is expressly within the intent of the writ. So, if he has declared his opinion touching the matter; or has been chosen arbitrator by one side; or is a parishioner of the parish whereof the other party is parson, and the right of the church comes in question; or has done any act by which it appears that he cannot be impartial; as, if he has eaten or drunk at the expense of either party, or taken money to give his verdict; these are principal causes of challenge.

Co. Lit. 158 a; Gilb. C. P. 95.

But, though a juror is not under the distress of either side, or has not given apparent marks of partiality; yet there may be sufficient reason to suspect he may be more favourable to one side than the other. And this is a challenge to the favour; as, if the juror's son has married the plaintiff's daughter; because this is not contained within the words of the writ, and therefore no principal cause of challenge, but only to the favour, because such juror is not within the power of the party. And in these inducements to suspicion of favour, the question is, whether the juryman is indifferent as he stands unsworn? For a juryman ought to be perfectly impartial to either side; for otherwise his affection will give weight to the evidence of one party, and an honest but weak man may be so much biassed as to think he goes by the evidence, when his affections add weight to the evidence. Now, since the writ expects those *by whom the truth may best known*, it excludes all those who are apparently partial without any trial, because they are not under the qualifications in the writ, since the truth cannot be known to them. But, where the partiality is not apparent, but only suspicious, then the juror is to be tried, whether favourable or not, that is, whether he comes within the description of the writ: and if the triers think he does, then he is to be set aside.

Co. Lit. 158 a; Gilb. C. P. 96. β The forming and expressing an opinion by a

juror of the guilt or innocence of a party on trial for a felony is a principal cause of challenge; the mere forming of an opinion is sufficient. The People v. Rathbun, 21 Wend. 509. See M'Clure v. The State, 1 Yerg. 206.*g*

If an action be brought (*a*) by a corporation, and the juror be of kin to any member, it is a principal challenge.

Co. Lit. 157 b. (*a*) Challenges are allowed where the issue concerns a city or corporation, and they are to make the panel, or where any of their body be to go on the jury or any of kin unto them, though the body corporate be not directly party to the suit. Hob. 87; Saund. 344.—So where a dean and chapter brought an assize, a juror was challenged, because he was brother to one of the prebendaries. Hob. 87.

If a juror be challenged for being of kin to one party, it is no counter-plea that he is of no kin also to the other; for the *venire* commands the sheriff to return those who are kin to neither.

Co. Lit. 157. *β* It is not a good cause of principal challenge to a juror that his sister is the wife of the nephew of the party. Rank v. Shewey, 4 Watts, 218. Nor is it sufficient cause of challenge that the juror is brother to one of the counsel of the parties. Pipher v. Lodges, 16 S. & R. 214. But a juror who married the daughter of a brother of a party is disqualified. Denn v. Clark, 1 Coxe, 444. And a juror who had married the sister of a party in another case, depending on the same principles with the one on trial, was excused from sitting as a juror, though his wife was then dead. The President, Directors, and Company of the Hartford bank v. Hart, 3 Day's Cases, 491. See also Jones v. Butterworth, 2 Penning. 456.*g*

An arbitrator chosen by both parties, whether he have treated of the matter or not; or chosen by one party, if he has never treated thereof; or a commissioner chosen by one party for examination of witnesses, and appointed under the great seal, cannot be challenged principally; but for such cause one may be challenged for favour.

Co. Lit. 158; 9 Co. 71 a. *β* A person called as a juror may be challenged on the ground that he was called as a witness for the plaintiff, and had given evidence on a former trial to a material matter. It appeared that he had been subpœnaed to impeach the character of a material witness for the defendant. Chess v. Chess, 1 Penns. 32.*g*

β In an action of trespass for the mesne profits, it is a good cause of principal challenge to a juror that he had acted as an arbitrator on the trial of an ejectment for the same land, formerly brought by the same defendant, and had signed an award in favour of the defendant.

Lloyd v. Nourse, 2 Rawle, 49. See Bellows v. Williams, Kirby, 166.*g*

If a juror be cousin to him in reversion, it is only a challenge to the favour, because he in reversion is not party to the record. But it is a principal challenge if he be party by voucher, aid, or receipt.

Co. Lit. 158. *β* A challenge to a juror for favour is tried by the court. Rollins v. Ames, 2 N. H. Rep. 349.*g*

It is a principal cause of challenge, that the juror is a witness named in the deed; or hath formerly given a verdict on the same cause, whether between the same parties, or others. ||But in this or other like cases, he that taketh the challenge must show the record, if he will have it take place as a principal challenge; otherwise he must conclude to the favour, unless it be a record of the same court, and then he may show the day and term.||

Co. Lit. 157 b; Cro. Eliz. 33, pl. 13; 2 Brownl. 268. *β* That the juror has once before tried the cause is a good cause of challenge. Bellows v. Williams, Kirby, 166. See Lloyd v. Nourse, 2 Rawle, 49.*g*

By the 25 E. 3, c. 3, it is enacted, "That no indictor shall be put on inquests upon deliverance of the indictees of felony or trespass, if he be challenged for such cause by him who is so indicted." And this hath been

adjudged a good exception not only on the trial of the same indictment, but also on a trial of another indictment or action, wherein the matter found in such former indictment is either directly in issue, or happens to be material.

|| It was a rule established in the reign of E. 1, that no indictor should be on the petit jury, and it was then allowed to be a good cause of challenge. But this rule not being duly observed, the Commons in 14 E. 3, petitioned for a law to confirm it, (Pet. Parl. 14 E. 3, 30,) which was at length done by this statute. In order to enable the defendant to make this challenge, it was usual to put the names of the indictors to the indictment; and it was a good exception to an indictment, that it was without them. 44 E. 3, 43 b. By indictors were meant not only the jurors, who presented, but those also who were sworn to inform them; or who, in the modern language of the law, preferred the indictment, 27 Ass. 12. The challenge against these last was supported upon the principle, that the accusor was a volunteer, and sort of party, and therefore not entitled to that credit which an indifferent witness enjoyed, who appeared and delivered his evidence under the compulsion of legal process. The statutes of 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, by providing a method of compelling persons to give evidence against the party at the jail-delivery, that is, both on the indictment, and on the trial, abolished the distinction between an accusor and a witness, and, consequently, took away this challenge. But we still find a vestige of this old law in the practice of endorsing on the indictment the names of the witnesses examined before the grand jury. Reeves's History of the Law, vol. ii. 268, vol. iii. 135, 136, vol. iv. 500—505. It would seem, however, that the challenge still remains as against one of the grand jury. R. v. Percival, 1 Sid. 244.||

|| In an *attaint*, it is a principal cause of challenge, that one of the petit jury is a tenant to one of the grand jury; for if the petit jury be convicted in the attaint, it will be a great prejudice to the seignory; for the houses shall be pulled down, and the meadows ploughed. In other actions, a challenge that the juror is lord to the party is only a challenge to the favour. Jenk. 141.||

It is a good cause of challenge, that a juror hath a claim to the forfeiture to be caused by the conviction, or that he hath declared his opinion beforehand; yet this has been adjudged to be no cause of challenge where it hath appeared to proceed not from any ill will, but from a knowledge of the cause.

2 Hawk. P. C. c. 43, § 28.

But it is no good cause of challenge, that the juror has found others guilty on the same indictment; for the indictment in judgment of law is several against each defendant, and every one must be convicted by particular evidence against himself.

2 Hawk. P. C. c. 43, § 29. β See State v. Zellers, 2 Halst. 220.β

It hath been ruled to be a good challenge on the part of the king, that the juror hath given his dogs the names of the king's witnesses.

2 Hawk. P. C. c. 43, § 30.

Though it seems to be settled, that where the king is a party, he may take either a principal challenge, or to the favour; yet it is said that the subject cannot take a challenge to the favour against the king, because every one is bound by his allegiance to favour the king. || But, if no more be meant by these books, than that such a challenge is not good without showing some actual partiality in such sheriff or juror, or some particular cause wherein the king may influence him, it seems not clearly settled how the king in this respect hath a greater privilege than the subject, which yet it seems agreed he hath.|| It is said to be a principal challenge against the king, that the jury is of his livery, or his immediate tenant. || But it is also said, that a challenge for such cause ought to conclude to the favour.

2 Hawk. P. C. c. 43, § 31, 32, 33. 22 Mr. Hargrave's note (5) to Co. Lit. 156 a.

In an information of forgery the defendant challenged one of the jury, for that the prosecutor had been lately entertained at his house; and that this was admitted to the favour, though against the king.

Vent. 309, which seems *cont.* to Cro. Eliz. 663.

A juror was challenged because he was tenant of a manor to which there was a court-leet, of which the plaintiff was steward; and it was holden, that this was no principal challenge, but only to the favour.

Allen, 29. βA tenant who holds land from year to year, as a cropper, is disqualified as a juror in an action to which his landlord is a party. Pipher v. Lodge, 16 S. & R. 214.*g*

Upon a trial at bar the question was, whether the fair called Wayhill Fair should be kept at Wayhill, or at Anderry? And one of the jury was challenged because he lived at Wayhill; and the objection was, that the fair occasioned manure to improve the ground. On the other side it was considered, that the fair occasioned trampling of the grass. This being a challenge to the favour, two of the jurors were sworn to be triers; and their oath was, *You shall well and truly try whether A (the juryman challenged) stands indifferent between the parties to this issue.*

Salk. 152.

Either party labouring a juror to appear, is no cause of challenge at all, but a lawful act.

Dyer, 48 a, pl. 19. Vide *infra* (M) 3. [*A fortiori* then, no cause to set aside a verdict. 1 Str. 643; Com. Rep. 601.]

β A juror who objected to being sworn, "because he had heard all the evidence at the former trial, and had made up and expressed his opinion on the facts then given in evidence, but who said that his mind was always open to conviction on another state of facts," was held incompetent.

Irvine v. Kean, 6 S. & R. 351.

In an ejectment to recover lands sold for taxes, it is not a sufficient cause of challenge of a juror, that he was a purchaser of other lands sold for taxes at a subsequent period.

Luffborough v. Parker, 16 S. & R. 351.

It is a good cause for a challenge for favour, that the juror, as a magistrate, has taken the principal deposition used by one party in the cause.

Rollins v. Ames, 2 N. H. Rep. 349.

General hostility between the juror and the party is a good cause of challenge.

Brittain v. Allen, 1 Dev. 120.

Where a juror after he is sworn in an action of slander expresses a wish to withdraw, because he himself had a similar suit, depending in the same court, where the slander was the same, but the counsel not consenting to withdraw him, the trial proceeds, and a verdict is rendered, the court ought not to grant a new trial.

Shobe v. Bell, 1 Rand. 39.*g*

6. *Where the Degree and Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.*

It seems to be agreed, that all persons, whose attendance is required in the superior courts of justice, such as serjeants at law, counsellors, attorneys, and other officers of the courts, are so far privileged as not to be summoned on juries. Also, peers of the realm are excluded, as not coming within the

qualifications mentioned in the writ, viz.: *ad faciendum quand. jurat. patriæ;* for they are not *pares patriæ*, but *pares* of a higher rank; and therefore it is clearly (*a*) agreed, that if a peer be returned on a jury, and bring a writ of privilege, he shall be discharged. Also, it seems to be the (*b*) better opinion, that even without such a writ he may challenge himself, or be challenged by either party.

Vide. tit. *Privilege.* β See State v. Williams, 1 Dev. & Bat. 372.*g* (*a*) Dyer, 314; Moor, 167. (*b*) 2 Roll. Abr. 646; Co. Lit. 157; 9 Co. 49; 6 Co. 53; Jones, 153.

But members of the House of Commons seem not to have any privilege to be exempt from serving on juries; yet in the case of Sir Edward Bainton, who was returned on a jury in B. R., the court would not force him to be sworn against his will, he being a parliament-man, and the parliament then sitting.

Pasch. 17; Car. 2, Sir Edw. Bainton's case.

Tenants in ancient demesne are not to be empannelled to appear at Westminster, or elsewhere in any other court, upon any inquest or trial of any cause.

4 Inst. 269.—And it is said, that they may have a writ *de non ponendis in assisis et juratis* against the sheriff, or any one who hath return of writs; and if notwithstanding such writ the sheriff will return them, they may have an attachment. 1 Co. 105. —A juror surmised at the bar, that he was a tenant in ancient demesne, and had his charter in his hand, and prayed to be exempted from the jury, and discharged; but the court did not regard it, but caused him to be sworn; and it was holden, that his proper remedy was against the sheriff, and that if he had made default and lost issues, he might show his charter in the Exchequer upon the amercement estreated, and there he should be discharged. Leon. 207.——By the common law a freehold in ancient demesne was not a sufficient qualification for a juror. 9 H. 7, 1, pl. 2; Bro. *Challenge* 157; Co. Lit. 156 b. But it is made so by 4 & 5 W. 3, c. 24. Vide *ante.*

It seems agreed, that the king by grant or his charter may exempt one, two, or more, from serving on juries. But he cannot exempt a whole county or hundred, (*c*) because in such case there would be a failure of justice. Also, it seems, that such exemption does not extend to jurors returned into the King's Bench, unless there be express words including that court. Also, by the better opinion, the sheriff cannot return such privilege of exemption, but each particular juror must come in and demand it.

R. v. Percival, Sid. 127, 243; Raym. 113, S. C.; Hard. 389, S. C.; 1 Liv. 159, S. C.; 1 Keb. 840, 853, 867, S. C. ‖ (*c*) But, where the inhabitants of a hundred had enjoyed an immemorial exemption from serving on juries, it was holden, that they were not liable under any of the statutes relative to jurors to be summoned; for those statutes being all in the affirmative do not take away the prior exemption. R. v. Pugh, Dougl. 188. The case of R. v. Percival was determined on the insufficiency of the return; for the sheriff, having returned the panel on the *venire*, whereby he admitted them chargeable to serve, could not on the *distringas* return a discharge.‖

By the statute of Westminster 2, c. 38, it is expressly provided, "That neither old men above the age of seventy years, nor persons perpetually sick, nor those who are infirm at the time of their summons, nor those who do not reside in the county, shall be put in juries, or in the lesser assizes:" In the construction of which it hath been holden, that though such persons may sue out a writ of privilege for their discharge, grounded on this statute; yet, if they be actually returned, and appear, they can neither be challenged by the party, nor excuse themselves from not serving, if there be not a sufficient number without them.*

2 Inst. 446; F. N. B. 165. * But the court, on application, will generally excuse, if there is a sufficient number remaining.

Clerks or persons in (*d*) holy orders, coroners, ministers of the forest,

officers of the army, and other officers and ministers belonging to the king, are exempt from serving on juries.

Dalt. Sher. 121; Trials per Pais, 86. (*d*) Where before the return the party became a minister of the church, and at the day of the return he appeared, and prayed to be discharged, according to the privilege of those of the ministry; the court would not allow of his prayer, because that at the time of the panel made he was a layman. 4 Leon, 190, Beecher's case.

|| By 5 H. 8, c. 6, and 18 G. 2, c. 15, Freemen of the Company of Surgeons in London are exempted from serving upon juries.||

By the 6 and 7 W. 3, c. 4, every person using and exercising the art of an apothecary in the city of London, or within seven miles thereof, being free of the Society of Apothecaries in the said city, and who shall have been duly examined and approved, &c., for so long a time as he shall exercise the said mystery, and no longer, shall be exempted from serving on any jury or inquest; and other persons exercising the said art of an apothecary in any other parts of the kingdom, who have served as apprentices seven years, according to the statute 5 Eliz. c. 4, shall likewise be exempted from serving on juries for so long a time as they shall use and exercise the said art, unless such person voluntarily consent to serve.

By the 7 and 8 W. 3, c. 21, all registered seamen are exempted from serving on juries.

By the 7 and 8 W. 3, c. 34, no Quaker, or reputed Quaker, shall serve on juries.

||By 1 W. and M. c. 18, § 11, and 19 G. 3, c. 44, Dissenting teachers qualified under the toleration act are exempted from serving upon juries.

By 31 G. 3, c. 32, Catholic clergymen are exempt from serving on juries.

Officers on the Cheque-roll (as gentlemen pensioners, &c.,) have an ancient privilege not to be sworn on juries.

Blagney's case, Ca. temp. Hardw. 202.

It is a cause of challenge, if the person returned be within the age of twenty-one.

Co. Lit. 157 a. See also st. 7 & 8 W. 3, c. 32, § 4.||

7. *Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.*

Here we must observe, that if a peer be impleaded by a commoner, yet such case shall not be tried by peers, but by a jury of the country; for though the peers are the proper *pares* to a lord of parliament in (*a*) capital matters, where the life and nobility of a peer is concerned; yet, in matter of property, the trial of facts is not by them, but by the inhabitants of those counties where the facts arise; since such peers, living through the whole kingdom, could not be generally cognisant of facts arising in several counties, as the inhabitants themselves where they are done. But this want of having noblemen for their jury was compensated as much as possible, by returning persons of the best quality.

Gilb. Hist. C. P. 37. (*a*) In which case a peer cannot challenge any of his peers, because the whole peers sit upon him, who are his proper judges. Moore, 621; Co. Lit. 156.

And therefore, if a peer of the realm or lord of parliament be demandant or plaintiff, tenant or defendant, there must be a knight (*b*) returned of his jury, be the lord (*c*) spiritual or temporal, else the array may be quashed. But (*d*) if a knight be returned, although he appear not, yet the jury may be

taken of the residue. And if others be joined with the lord of parliament, yet, if there be no knight returned, the array shall be quashed against all.

Co. Lit. 156 a; 6 Co. 53. (*b*) By 24 G. 2, c. 18, § 4, ‖ reciting, "That great delays do frequently happen in trials, where a peer or lord of parliament is party, by reason of challenges to the arrays of panels of jurors, for want of a knight's being returned on such panels, it is enacted, that no challenge shall be taken to any panel of jurors for want of a knight's being returned in such panel, nor any array quashed by reason of any such challenge." The provision in this act, we see, is made in *general* terms, though the recital is confined to the inconveniences of such challenges where *peers* are parties. But Sir Wm. Blackstone says, still, in an attaint, a knight must be returned on the jury. 3 Comm. 359. *Qu.*‖ (*c*) That a bishop being indicted for trespass, a knight ought to be returned. Leon. 5. (*d*) That if a knight be but returned on a jury when a nobleman is concerned, it is not material whether he appear and give his verdict or no. Mod. 226. ‖ But the reason that knights were to be on a jury, where a peer was concerned, was for the security of the commons; for a knight, saith Lord Holt, was presumed to be a man of courage, and not afraid to look a peer in the face. 11 Mod. 102.‖

In an attaint there ought to be a knight returned of the jury, and in a writ of right four knights were to be returned.

Co. Lit. 156 a; Leon. 303; Dals. 68; Jenk. 11, 89.

8. *Of Trials* per Medietatem Linguæ, *where an Alien is Party.*

By the 28 E. 3, c. 13, § 2, it is enacted, "That in all manner of inquests and proofs which be to be taken or made amongst aliens, and denizens, be they merchants or others, as well before the mayor of the staple as before any other justices or ministers, although the king be party, the one half of the inquest or proof shall be denizens, and the other half aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties, nor with the parties in contracts, pleas, or other quarrels, whereof such inquests or proofs ought to be taken; and if there be not so many aliens, then shall there be put in such inquests or proofs as many aliens as shall be found in the same towns or places, which be not thereto parties, nor with the parties as aforesaid, and the remnant of denizens, which be good men, and not suspicious to the one party nor to the other."

‖ By the statute of the Staple, 27 E. 3, st. 2, c. 8, if a matter was to be tried by an inquest within the staple, and the parties were both strangers, it was to be tried by strangers; if denizens, by denizens; if one was an alien, and the other a denizen, then the inquest was to consist of half denizens and half aliens. This liberal spirit towards foreigners, says Mr. Reeves, in treating of the statute of 28 E. 3, had been distinguishing itself through the whole of this reign, particularly in matters that concerned the interests of commerce. And as a proof of it he adds, that some years before the invidious distinction that had been kept up between the English and French by presentments of Englishery, had been removed by the entire abolition of that proceeding. Hist. of the Law, vol. ii. 461. It is not very easy to see how the abolition of that proceeding can be considered as an instance of the liberal spirit of the times towards foreigners, unless that by the removing of this distinction between the English and French, it was intended to reconcile the former to the latter. But this is not the reason assigned in the statute of 14 E. 3, st. 1, c. 4, by which the alteration was effected; and as the nation was then involved in the French wars, the measure was more likely to have proceeded from a very different spirit; the direct and immediate effect of it being to take away that protection from secret assassinations, which the law, from the time of the Conqueror, had thrown round the French in this country.‖

‖ If the plaintiff or defendant be executor or administrator, though he be an alien, yet the trial shall be by English, because he sues in *auter droit;* but if it be averred that the testator or intestate was an alien, it will be otherwise.

Wingate v. Marke, Cro. Eliz. 275. See 8 H. 6, *supra.*‖

(E) Who are to be returned, &c.

In the construction of the statute of 28 E. 3, c. 13, it hath been agreed, that the statutes which require that the jurors shall have tenements to a certain value, do not (*a*) extend to aliens returned by virtue of this statute, but only to the inquests to be taken between denizens, who are to have lands or tenements to the same value as in other cases.

2 Hawk. P. C. c. 43, § 35. || The stat. of 4 & 5 W. & M. c. 24, § 15, *supra* (E) 3, expressly excepts strangers upon trials *per medietatem linguæ*. And it seems that the English half of the jury ought to have the estates required in other cases. 2 Hawk. P. C. c. 43, § 35. By 11 H. 7, c. 21, it is provided, that upon all attaints to be commenced within the city of London upon any record, wherein the trial and inquest was by *half-tongue*, the mayor and aldermen shall empannel the grand jury in the same attaint, the one-half of strangers of good fame, and of the substance of goods to the value of C. *li.* and more, inhabiting within the same city at large, and the residue of the same grand jury to be of like value and substance of goods empannelled of the citizens.|| (*a*) And therefore it hath been adjudged, *quorum quilibet habeat quatuor libratas terræ*, &c., shall be applied to the English only. Cro. Eliz. 272, 841.

Also, it is settled, that those on the grand jury, or who find an indictment against an alien, need not be aliens.

2 Hawk. P. C. c. 43, § 36.

Neither is it necessary, that the petit jury in an action or appeal by an alien against an alien, should be half aliens, and half English; for the words are, *All inquests, &c., between aliens and denizens.*

2 Hawk. P. C. c. 43, § 38.

||By the 8 H. 6, c. 29, after reciting the 28 E. 3, and also the 2 H. 5, st. 2, c. 3, (*supra*,) which requires jurors to have lands or tenements to the yearly value of forty shillings; and reciting further, "That because of that restraint and impeachment so made to divers merchants aliens, many of the same merchants aliens had withdrawn, and daily did withdraw them, and eschew to come and be conversant on this side the sea, and likely it was, that all the same merchants aliens would depart out of the same realm, if the said last statute were not more openly declared, and the said merchants aliens, ruled, governed, and demeaned in such inquests, according to the form of the first ordinance aforesaid, to the great diminishing of the king's subsidies, and grievous loss and damage to his whole realm aforesaid; our lord the king, considering the premises, and that it was not the intention of the said late king, nor of the lords spiritual and temporal of his said parliament, to abrogate or prejudice the said first ordinance by the said last statute, and that the same last statute was made by reason of the mischiefs and disherisons which happened by the false oaths of the common jurors of the realm, as it appeareth by the express words of the same statute, and how that the said merchants aliens are not common jurors, nor inhabiting within the said realm, nor can purchase nor enjoy any lands or tenements therein without the special license of the king; and the same our lord the king, willing therefore to provide for the good and profit of him and of his said realm, and to eschew the damages and inconveniences which may easily happen in this behalf, and also to give to the said merchants aliens greater courage and desire to come into this realm, by the advice and assent of the lords spiritual and temporal being in this present parliament, hath declared the said last statute made in the time of his said father, to be in no wise prejudicial to the said first ordinance, nor to extend itself but only to inquests to be taken between denizen and denizen, and not to other inquests and proofs aforesaid; and the said first ordinance to be effectual and to stand in its force, and to be put in due execution according to the form thereof, the

said last statute, or that the aliens have not lands or tenements to the value of forty shillings by the year, according to the purport of the same last statute notwithstanding."

Upon an information exhibited by the attorney-general against several merchants, some of whom were aliens and some English; after issue joined, the aliens prayed a trial *per medietatem linguæ:* but it was resolved by all the judges of England, that they should not have it and they likened it to the case of privilege, where one of the defendants demands privilege, and the court, as to his companion, cannot hold plea; there, he shall be ousted of his privilege.—*Sic hic.*

Barre's case, Moore, 557.‖

If an alien neglect to pray the benefit of the statute (*a*) before the return of a common *venire*, he can neither except to such *venire*, nor pray a subsequent process *de medietate linguæ.*

Dyer, 28, pl. 180, 145, pl. 60, 304, pl. 51, 357, pl. 45; 2 Roll. Abr. 643; Cro. Eliz. 869. β On being arraigned the defendant suggested that he was an alien, and the court ordered the sheriff to return a panel of jurors *de medietate linguæ.* The People v. M'Lean, 2 Johns. 381. This jury is now used in but a few if any of the states of the American union. 6 Dane's Ab. c. 182, a. 4, n. 1.*g* (*a*) If upon an indictment of felony against an alien he plead not guilty, and a common jury be returned, if he do not surmise his being an alien, before any of the jury sworn, he hath lost that advantage. But, if he allege that he is an alien, he may challenge the array for that cause, and thereupon a new precept or *venire* shall issue, or an award be made of a jury *de medietate linguæ.* But it is more proper for him to surmise it upon his plea pleaded, and thereupon to pray it. 2 Hal. Hist. P. C. 272.

β In North Carolina, an alien is not entitled to a jury *de medietate linguæ.*

State v. Antonio, 4 Hawks, 200.*g*

The return of a *venire de medietate linguæ* ought to (*b*) show which of the jurors are denizens, and which aliens, and a full number of each must appear to be sworn. If there be not enough to make up a full number of six denizens and six aliens, the justices of *nisi prius* (*c*) may, by construction of the statutes which give a *tales de circumstantibus*, awards such *tales* for so many denizens and aliens as shall be wanting.

Cro. Eliz. 818; 2 Hawk. P. C. c. 43, § 45. (*b*) But this being only a misreturn, is helped by verdict in cases within the statutes of jeofail. Cro. Eliz. 84. (*c*) 10 Co. 104; Cro. Eliz. 305.

If on a *venire* of half denizens and half aliens the sheriff return twelve all aliens, and among them some who in truth are not such, the party shall not be concluded by such return, but may notwithstanding challenge the array for want of a sufficient number of aliens.

2 Roll. Abr. 643.

Some of the precedents of awards of *venires de medietate linguæ* mention, that the aliens to be returned shall be of the same country whereof the party alleges himself; but others direct generally, that one half of the jury shall be aliens, without specifying any particular country; and these last seem most agreeable to the statute, and to be confirmed by the late practice, and great number of authorities.

2 Hawk. P. C. c. 43, § 42.

‖ Sir W. Blackstone questions, whether the statute of 3 G. 2, c. 25, (*supra,*) may not in civil causes have undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of empannelling jurors, and the persons to be returned in such panel? So that (unless this statute is to be construed by the same equity

which the statute of 8 H. 6, (*supra*) declared to be the rule of interpreting the statute of 2 H. 5, (*supra*) concerning the landed qualification of jurors in suits to which aliens are parties) a court might perhaps hesitate, whether it has now a power to direct a panel to be returned *de medietate linguæ*, and thereby alter the method prescribed for striking a special jury, or balloting for common jurors.

3 Comm. 360.

On a writ of inquiry of damages, the inquest shall be all of English, and no part of aliens, for it is out of the statute.

Tr. per Pais, 245.

It was resolved that, if both parties be aliens, the inquest shall be all English; for though the English may be supposed to favour themselves more than strangers, yet, when both parties are aliens, it will be presumed they favour both alike, and so indifferent. But, if the plea be before the mayor of the staple, and both parties alien merchants of the staple, it shall be tried by all aliens.

St. P. C. 259 b; Tr. per Pais, 242.‖

It hath been holden, that denizens so made by letters patent are denizens within the intent of this statute. Also, it was holden, before the union of England and Scotland under James I. that a Scot was not an alien within the meaning of this statute, [not only because the Scotch language is the same with the English, but also because the Scots were never reckoned aliens, (*a*) but rather subjects.]

2 Hawk. P. C. c. 43, § 41; Dy. 364. [(*a*) In a note to this passage this reason is questioned, as seeming contrary to what is admitted in the whole argument of Calvin's case, 7 Co. See also State Trials, vol. i. 572, vol. iv. 652; and see Mr. Lingard's Hist. of England, vol. i. & ii.]

It hath been holden, that as to treason this statute is repealed by 1 & 2 P. & M. c. 10, which requires that trials of treason shall be according to the common law.

2 Hal. H. P. C. 271; 2 Hawk. P. C. c. 43, § 37.

By the 22 H. 8, c. 10, enforced by the 1 & 2 P. & M. c. 4, § 3, and 5 El. c. 20, § 3, Egyptians are to be tried by the inhabitants of the county or place where they shall be taken, and not *per medietatem linguæ*.

‖But by 13 & 14 C. 2, c. 11, § 11, in actions concerning tonnage and poundage, or ships or goods to be forfeited by reason of unlawful importation or exportation, there shall not be any party jury, but such only as are natural born subjects.‖

9. *Of Peremptory Challenges.*

By the common law, in all capital cases (in which only peremptory challenges were allowed) the prisoner could challenge thirty-five peremptorily. And this was because the trial by the petit jury came instead of the ordeal, and the petit jury of twelve being after the manner of the canonical purgation, and because the whole *pares* were not on his jury, but only a select number was chosen by the criminal himself, as was usual among the canonists, therefore they took a middle way, and gave the defendant liberty to challenge peremptorily any number under three juries, four juries being as many as generally appeared, to make the total *pares* of the county.

Lamb. 4, c. 14. β On a capital charge, the prisoner is entitled at common law, to challenge peremptorily thirty-five jurors. The United States v. Johns, 4 Dall. 414.β

(E) Who are to be returned, &c.

This kind of challenge, as has been observed, was allowable by the common law in all capital cases, both upon indictments and appeals, and also in misprision of high treason; but it was enacted by 33 H. 8, c. 23, § 3, *That it should not be allowed in any cases of high treason, nor misprision of high treason;* which statute being repealed by 1 P. & M. c. 10, the ancient course of the common law as to trials of treason is restored, and, consequently, such challenge revived. But it is made a doubt, whether by any statute it is revived in case of misprision of treason, the statute 1 P. & M. c. 10, not extending, as it is said, to misprision of high treason.

2 Hal. Hist. P. C. 268; 2 Hawk. P. C. c. 43, § 5.

It is enacted by 22 H. 8, c. 14, § 7, made perpetual by 32 H. 8, c. 3, that no person arraigned for any petit treason, murder, or felony, be admitted to any peremptory challenge above the number of twenty. But it has been holden, that 1 & 2 P. & M. c. 10, § 7, which restores the course of the common law as to trials of treason, has revived the old challenge of thirty-five in trials of petit treason; and therefore, it is agreed, that at this day, in cases of high treason, and petit treason, the prisoner may challenge thirty-five peremptorily, and twenty in all other capital offences.

2 Hal. Hist. P. C. 267; 2 Hawk. P. C. c. 43, § 8.

This peremptory challenge seems, by the better opinion, to be only allowable when the prisoner pleads the general issue. Therefore by the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he could not challenge peremptorily. The like law if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

2 Hal. Hist. 257; 2 Hawk. P. C. c. 43, § 7, and several authorities there cited. [Charles Radcliffe had been convicted of high-treason; and upon a collateral issue that he was not the same person, a peremptory challenge was insisted upon, which was refused by Lee, C. J.; 1 Bl. Rep. 4, 6; Fost. Cr. Law. 40.]

There seems to be some diversity of opinions in case of a prisoner's challenging peremptorily more than he is allowed by law. And herein my Lord Hale lays down the law to be, that, at common law, if the prisoner peremptorily challenged above thirty-five persons, and insisted upon it, and would not leave his challenge, then, in case of an indictment of high treason, it amounted to *nihil dicit*, and judgment of death should be given against him; but, in case of petit treason or felony, the prisoner anciently was put to *peine fort et dure*, as declining the trial the law appointed; the consequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and, consequently, no escheat of his lands. And thus, says he, the practice was until the beginning of the reign of H. 7. But afterwards, by the advice of all the judges of both benches, it was resolved, that the party so peremptorily challenging above thirty-five, should have judgment of death, and that it amounted to an attainder; for having pleaded to the felony, and put himself upon the country, here could be no standing mute; and therefore the judges resolved on this course, as most consonant to law, to be practised in all circuits. But for all this, adds he, the better opinion of later times, as well as of former, is, that the judgment in the case of such a peremptory challenge of above thirty-five at the common law, in case of felony, was not an attainder, but only penance, to which the party was awarded without having any jury empannelled.

2 Hal. Hist. P. C. 263. β If a prisoner challenge the thirty-sixth juror, on a capital

trial, the challenge shall not be allowed. State v. Gayner, Conf. Rep. 305.—— The barbarous punishment of *peine forte et dure* has been abolished in the United States.*g*

There seems also some diversity of opinions, as to what is to be done with a prisoner who, since the statute of 22 H. 8, c. 14, challenges above twenty in felony. And herein the better opinion seems to be, that he shall neither forfeit his goods, nor have judgment of death, nor of *peine fort et dure*, but shall only be overruled as to his challenges, so far as they exceed twenty, and put upon his trial. And herewith agrees my Lord Hale, and that, he says, for two reasons; 1. Because the statute hath made no provision to attaint the felon, if he challenges above the number of twenty. 2. Because the words of the statute of 22 H. 8, c. 14, are, *That he be not admitted to challenge above the number of twenty;* so that if he challenge above twenty peremptorily, his challenge shall only be disallowed.

2 Hal. Hist. P. C. 269, 270; 2 Hawk. P. C. c. 43, § 9; 4 Bl. Comm. 354.

If twenty men are indicted for the same offence, though by one indictment, yet every prisoner is allowed his peremptory challenge; and if there be but one *venire facias* awarded to try them, the persons challenged by any one shall be withdrawn against them all.

2 Hal. Hist. P. C. 268.

If A be indicted and plead not guilty; the jury appear; he challenge six of the jury for cause; and the cause be found insufficient; and the six be sworn; and the rest of the jury challenged off, whereby the inquest remains *pro defectu juratorum;* a *tales* granted, and the jury appear; the prisoner may challenge peremptorily any of the six that were before challenged, for cause, allowed and sworn; for it is possible a new cause of challenge may intervene after the former swearing. But, if a man challenge him for cause, he must show a cause happened after the former swearing.

2 Hal. Hist. P. C. 270; 32 H. 6, 26 b; 14 H. 7, 19 a.

But, if the prisoner, upon the first panel, had challenged, for instance, fifteen peremptorily, and then the jury remains for default of jurors; and a *distringas* with a forty *tales* is granted; he shall challenge peremptorily no more than will fill up his number, viz., in case of felony, at this day, five more, and in case of treason, or petit treason, twenty more, to make up his full number of twenty peremptory challenges in the first case, and thirty-five in the last.

2 Hal. Hist. P. C. 270. *g*The prisoner may challenge for cause, and reserve his peremptory challenges to the latest possible period, namely, up to the actual swearing of the jury. Hooker v. The State of Ohio, 4 Ohio, 350.*g*

10. *Of Challenges by the King.*

The king, or any one on his behalf, may, on sufficient cause, challenge either the array, or the polls, in the same manner as a private person may. Also, by the common law, the king, without assigning any reason, but barely alleging, *quod non sunt boni pro rege*, might have challenged peremptorily as many as he thought proper.

Co. Lit. 156; 2 Inst. 431; 2 Hal. Hist. P. C. 271.

But this is remedied by 33 E. 1, st. 4, commonly called *ordinatio de inquisitionibus*, which enacteth as follows: "Of inquests to be taken before any of the justices, and wherein our lord the king is party, howsoever it be; it is agreed and ordained by the king, and all his counsel, that from henceforth, notwithstanding it be alleged by them that sue for the king, that the

jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but, if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court."

In the construction of this statute it hath been clearly settled, that the words thereof being general, it extends to all causes, as well criminal as civil, whereto the king is party.

Moore, 595; Co. Lit. 159.

It hath also been agreed, and is now the established practice of the courts, that if the king challenge a juror before the panel is perused, he needs not show any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the king to show cause presently, challenge *touts paravaile*, yet it hath been adjudged, that the defendant shall be first put to show all his causes of challenge, before the king need to show any.

Co. Lit. 156 b, n. (4); Vent. 309; Raym. 473; Skin. 82; 2 Hal. Hist. P. C. 271.

11. *At what Time a Challenge is to be taken.*

It is laid down as a rule, that there can be no challenge either to the array, or polls, before a full jury appears; and therefore in a case where the plaintiff, after he had prayed a *tales*, challenged the array thereof for partiality in the sheriff; though it was objected, that this being by his own desire, he was afterwards estopped to take any exceptions to the sheriff; yet the challenge was allowed good, and the *venire* directed to the sheriffs; for if he had not prayed a *tales*, there could not have been a full jury, and then there could be no challenges.

Hob. 235, Vicars v. Langham.

Also, it is laid down as a rule, that no juror can be challenged without consent after he hath been sworn, either in a criminal or civil case, or either at the suit of the king or subject, whether on the same day, or, according to the better opinion, on a former on the same trial, unless it be for some cause which happened since he was sworn.

Co. Lit. 158 a; Yelv. 23; Cro. Car. 291; Hob. 235; 2 Roll. Abr. 658; Jenk. 310; 2 Brownl. 275; 2 Hal. Hist. P. C. 274.

He who hath several causes of challenge against a juror must take them all at once.

Co. Lit. 158 a.

If a juror be challenged by one party and found indifferent, the other party may challenge him afterwards.

Co. Lit. 158 a.

In case of treason, or felony, if the prisoner challenge a juror for cause which is held insufficient, he may afterwards challenge him peremptorily.

Co. Lit. 158 a.

A challenge for the hundred must be taken before so many be sworn as will serve for hundredors, or else the party loseth the advantage thereof.

Co. Lit. 158 a. See now stat. 4 Ann. c. 16, § 6, & 24 G. 2, c. 18, § 3.

After a challenge to the array, the party may challenge the polls; but after a challenge to the polls, there can be no challenge to the array.

Co. Lit. 158 a.

(E) Who are to be returned, &c.

|| If a party have cause of challenge, and know of it time enough before the trial, if he do not challenge, he shall not have a new trial: *secùs*, if he have not timely notice of it.

Herbert v. Shaw, 11 Mod. 111, 118.||

12. *How such Challenge is to be tried.*

Here we must take notice, that a principal cause of challenge is grounded on such a manifest presumption of partiality, that if it be found true, it unquestionably sets aside the array, or the juror, without any other trial than its being made out to the satisfaction of the court before which the panel is returned. But a challenge to the favour, where the partiality is not apparent, must be left to the discretion of the triers.

Co. Lit. 155, 157 b.

If the array be challenged, it lies in the discretion of the court how it shall be tried. Sometimes it is done by two attorneys; sometimes by two coroners; and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge be found in favour of partiality, then by any other two assigned thereunto by the court.

Roll. Rep. 363; Co. Lit. 158; 2 Hal. Hist. P. C. 275.

As to a challenge to the polls, if a juror be challenged before any juror sworn, two triers shall be appointed by the court; and if he be found indifferent, and sworn, he and the two triers shall try the next challenge; and if he be tried, and found indifferent, then the two first triers shall be discharged and the two jurors tried and found indifferent shall try the rest.

Co. Lit. 158; 2 Hal. Hist. P. C. 275.

If the plaintiff challenge ten, and the prisoner one, then he that remains shall have added to him one chosen by the plaintiff and another by the prisoner, and they three shall try the challenge. If six be sworn, and the rest challenged, the court may assign any two of the six sworn to try the challenges.

2 Hal. Hist. P. C. 275.

The triers cannot exceed two, unless it be by consent; which was taken up in imitation of the trial of the summons of the party, which was by two persons; this being (*a*) whether such a juror, as was described in the writ, was warned, viz. one *per qu. rei verit. melius sciri poterit, &c.*

Co. Lit. 158 a. (*a*) And his oath is, You shall well and truly try whether A, the juryman challenged, stand indifferent between the parties to this issue. Salk. 152, pl. 1.——Where a challenge is to the array for favour, the plaintiff may either confess it, or plead to it. If he pleads, the judges assign triers to try the array, who seldom exceed two, and being chosen and sworn, the associate, or clerk in court, doth declare and rehearse unto them the matter and cause of the challenge, and after he hath so done, concludes to them thus; and so your charge is to inquire, whether it be an impartial array or a favourable one; and if they affirm it, the clerk enters underneath the challenge *affirmatur;* but, if the triers find it favourable, then thus, *calumnia vera.* Trials per Pais, 165.

The triers, as far as they act therein, are officers of the court, and liable to be punished for any misdemeanor. Also it is said, (*b*) that if they find against law, and the direction of the court, they may be fined and imprisoned.

Palm. 363. (*b*) But *qu.* whether they are not in this respect to be considered as jurors, and acting in a judicial capacity?

(F) How Jurors are to be empannelled and sworn.

The truth of the matter alleged as cause of challenge must be made out by (*a*) witnesses to the satisfaction of the triers. Also, the juror challenged may, on a *voir dire*, be asked such questions as do not tend to infamy or disgrace; such as, whether he hath a freehold, whether he hath an interest in the cause; and in a civil cause, whether he hath given his opinion beforehand upon the right, which he might have done as arbitrator between the parties.

Co. Lit. 158; Trials per Pais, 158; Salk. 153, pl. 3. (*a*) That one witness to prove the challenge is sufficient. Show. 173.

But in no case can a juror be asked, whether he hath been whipped for larceny, or convict of felony, or whether ever he was committed to Bridewell for a pilferer, or to Newgate for clipping and coining, or whether he is a villein or outlawed; because these kind of questions tend to make a man discover that of himself which tends to his disgrace. Also, it was holden in (*b*) a trial for high treason, that the prisoner, in order to challenge a juror, could not ask him, whether he had not declared his opinion beforehand that he was guilty, or would be hanged, because these questions tend to reproach, as charging him with a misdemeanor.

Keeling, 9; Trials per Pais, 158. (*b*) Salk. 153, pl. 3, Coke's trial.

If a challenge be taken, and the other side demur, and it be debated, and the judge overrule it, it is entered upon the original record; and if at *nisi prius*, it appears upon the *postea* what the judge hath done. But if the judge overrule the challenge upon debate without a demurrer, then it is proper for (*c*) a bill of exceptions.

R. v. City of Worcester, Skin. 101; Eire v. Bannister, Hutt. 24. (*c*) That such bill must be, that he overruled the challenge, not *quod recusavit* the challenge. Skin. *ubi supra.*

It is said, that a demurrer upon a challenge is not like to a demurrer upon a plea; for in case of a demurrer upon a challenge, as soon as the demurrer is agreed on at the bar, it is good enough, without other circumstances, such as counsel's hand, &c., and the prothonotaries of right ought to enter such demurrer.

Mounson and West's case, 3 Leon. 222.

(F) How Jurors are to be empannelled and sworn.

By the 3 G. c. 25, § 11, it is enacted, "That the name of each and every person, who shall be summoned and empannelled, with his addition and the place of his abode, shall be written in several and distinct pieces of parchment, or paper, being all, as near as may be, of equal size and bigness, and shall be delivered to the marshal of such judge of assize or *nisi prius*, or of the said great sessions, or of the sessions of the said counties palatine, who is to try the causes in the said county, by the under-sheriff of the said county, or some agent of his; and shall, by direction and care of such marshal, be rolled up all, as near as may be, in the same manner, and put together into a box or glass to be provided for that purpose; and when any cause shall be brought on to be tried, some indifferent person, by direction of the court, may and shall, in open court, draw out twelve of the said parchments or papers, one after another; and if any of the persons, whose names shall be so drawn, shall not appear, or be challenged and set aside, then such further number, until twelve persons be drawn who shall appear, and, after all causes of challenge, shall be allowed as fair and indifferent; and the said twelve persons so first drawn and appearing, and approved as

indifferent, their names being marked in the panel, and they being sworn, shall be the jury to try the said cause; and the names of the persons so drawn and sworn shall be kept apart by themselves, in some other box or glass to be kept for that purpose, till such jury shall have given in their verdict, and the same is recorded; or until such jury shall, by consent of the parties, or leave of the court, be discharged; and then the same names shall be rolled up again, and returned to the former box or glass, there to be kept with the other names remaining at that time undrawn; and so *toties quoties*, as long as any cause remains then to be tried.

§ 12. Provided "That if any cause shall be brought on to be tried in any of the said courts respectively, before the jury in any other cause shall have brought in their verdict, or be discharged, it shall and may be lawful for the court to order twelve of the residue of the parchments, or papers, not containing the names of any of the jurors who shall not have so brought in their verdict, or be discharged, to be drawn in such manner as is aforesaid, for the trial of the cause which shall be so brought on to be tried."

In capital cases the sheriff returns the panel of the jury, who being called, and appearing, the prisoners are told by the clerk, that these good men now called and appearing, are to pass on their lives and deaths, therefore if they will challenge any of them, they are to do it before they are sworn; and if no challenge hinder, the jury are commanded to look on the prisoners, and then severally twelve of them, (*a*) neither more nor less, are sworn.

2 Hal. Hist. P. C. 293. (*a*) But, if thirteen are by mistake sworn, the swearing of the last by mistake is void, and the other twelve shall serve.——But, if eleven be sworn by mistake, no verdict can be taken of the eleven; and if it be, it is error. And so in a presentment. But, if twelve be recorded sworn, no averment lies that one was unsworn.——Upon not guilty pleaded, twelve are sworn to try the issue; after their departure one of the twelve leaves his companions, which being discovered to the court, by consent of all parties, B, another of the panel, is sworn in the place of A, and afterwards A returns to his companions, which being made known to the court, A is called and examined, why he departed; he answered to drink; and being examined whether he had spoken with the defendant, denied it upon his oath; whereupon B was discharged from giving any verdict, and the verdict taken of A, and the other eleven, and A fined for his contempt. 2 Hal. Hist. P. C. 296.

Although there be twenty prisoners at the bar for several felonies, and the oath be general to try between the king and the prisoners at the bar; yet the jury is to inquire of no (*b*) more than what they are particularly charged with. And therefore though twenty have pleaded, and stand at the bar when the jury is sworn; yet the court may stay any number of the prisoners, and so the jury stand charged with no more than what are thus particularly charged upon them. And when they go from the bar and have brought in their verdict touching these particulars charged upon them; then, if the same jury pass upon the remaining prisoners, yet they are to be called over again, and the prisoners reminded of their challenges, and the jury sworn *de novo* upon the trial of the rest of the prisoners.

2 Hal. Hist. P. C. 294. (*b*) An exception was taken to a judgment in an inferior court, that it was twelve *probi electi, triati, jurati*, &c., without saying *ad veritat. de præmissis dicend.*; and this was holden error; for they might be sworn in another cause at the same court. And the difference was said to be betwixt a jury in criminal and civil matters; for the oath which the jury take in criminal matters, is, that they shall truly try and true deliverance make of the prisoners at the bar, &c., so the court may charge them with as many prisoners as they think fit; but in civil matters the jury must be sworn anew in every several case. Mich. 29 Car. 2, in C. B. Watson and Goodman.

(G) How to be kept and discharged.

When the jurors depart from the bar (*a*) a bailiff ought to be sworn to keep them together, and not to suffer any to speak with them.

2 Hal. Hist. P. C. 296. (*a*) That a bailiff is to be sworn in a civil as well as a criminal case. Palm. 380. β The separation of the jury before rendering their verdict, though a misdemeanor, does not, of itself, vitiate their verdict especially if they had agreed upon their verdict before separating. Brown v. M'Connell, 1 Bibb, 265.*g*

After their departure they may desire to hear one of the witnesses again, and it shall be granted, so he deliver his testimony in (*b*) open court; and also they may desire to propound questions to the court, for their satisfaction, and it shall be granted, so it be in open court.

2 Hal. Hist. P. C. 296. (*b*) Therefore in a civil case, where the jury withdrew to confer about their verdict, one of the witnesses, that was before sworn, on the part of the defendant, was called by the jurors; and he recited again his evidence to them, and they gave their verdict for the defendant. And complaint being made to the judge of assize of this misdemeanor, he examined the jury, who confessed all the matter, and that the evidence was the same in effect that was given before, *et non alia nec diversa*. And this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire facias de novo* was awarded. Metcalfe v. Dean, Tr. El. 189.

β Where a jury retired from the bar, and did not return, and no further notice of them appears on the record, it was held that they were discharged at the end of the term, and that a *venire facias de novo* was proper.

Brooks v. Clay, 3 Marsh. 546.*g*

The jury must be kept together without meat, drink, fire, or candle, till they are agreed.

Co. Lit. 227 b; 2 Hal. Hist. P. C. 297. See Observations on the Statutes, 302, note (k), for the origin of this. See also Pettingal's Inquiry, p. 188. β In modern times refreshments are allowed to jurors even in capital cases. Comm. v. Clue, 3 Rawle, 498; State v. Sparrow, 3 Murph. 487.*g*

So, in an inferior court, if the jury will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree; and the steward may from time to time adjourn the court till such agreement.

Salk. 201; 7 Mod. 1.

If they agree not before the departure of the justices of jail-delivery into another county, the sheriff must send them along with them in carts, and the judge may take and record their verdict in a foreign county.

Vent. 97; 2 Hal. Hist. P. C. 297. But it is made a *quære*, whether in such cases the session may be adjourned before the verdict taken.

If there be eleven agreed, and but one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven, no nor yet the refuser fined or imprisoned; and therefore, where such a verdict was taken by eleven, and the twelfth fined and imprisoned, it was, upon great advice, ruled that the verdict was void, and the twelfth man delivered, and a new *venire* awarded; for men are not to be forced to give their verdict against their judgment.

2 Hal. Hist. P. C. 297; ‖ 41 E. 3, pl. 36, 41; Ass. 11; Fitzh. *Judgment*, 89, *Verdict*, 43; Br. *Enquest*, 65, 105, *Verdict*, 49. In the case from which the text is extracted; and which is to be found in the books here cited, the court were very clear that the verdict of the eleven could not stand; and being pressed with a case where such a verdict had been taken, and the twelfth juror imprisoned, the record of which was ready to be produced, (Br. *Jurors*, p. 53,) they said, that if a dozen records to that effect were produced, they would be of no use; and that the judge who had so decided, had been greatly blamed for it. βA cause cannot be tried by eleven jurors, 1 Penning.

146; 2 Penning. 911, 945; nor by thirteen. 2 Hayw. 113.*g* However, a practice certainly did prevail in the reign of E. 1, and Lord Hale points to the record at the end of this very paragraph, (P. 20 E. 1; Rot. 43; Norf. *coram rege*,) where the jury could not agree, of entering the verdict of the greater and also that of the less part of the jurors, and then giving judgment *ex dicto majoris partis juratorum*. Glanville mentions another method of proceeding in this case, and that was by adding others to the jury till twelve at least were agreed in favour of one of the parties. His words are, *Si quidam eorum dixerint pro uno, quidam pro alio litigantium, adjiciendi sunt alii donec duodecim ad minus in alterutram partem concorditer acquieverint*, lib. ii. c. 17. Bracton speaks of this mode, which he calls "afforcing" the assize, but with some alteration; for, instead of adding others till they had gotten twelve who were agreed, as in the time of Glanville, the course now was to add others, according to the number of dissenting voices, to the major part of the assize, and if they agreed, to take the verdict; and the dissenting jurors, the smaller part, were to be amerced *quasi pro transgressione*, as guilty of a sort of offence. *Sed alii* (the dissenting jurors) *propter hoc non erunt convicti, sed quasi pro transgressione amerciendi, quia adhuc bene poterit esse, quod ipsi veritatem dixerint, et alii mendacium, qui adhuc convinci poterunt de perjurio*, lib. iv. tr. i. c. 19, § 4. Mr. Reeves supposes this *quasi* offence to have been their obstinately maintaining a difference of opinion; but he forgets that the jurors were not then judges, but witnesses; that it was not a difference of opinion, but an opposition of testimony; and the putting of the afforcement to the majority, though done, most probably, for no other reason, than because the fewer were to be added, the sooner the unanimity sought for was likely to be attained, seemed to imply an approbation of the verdict they would give, and consequently threw a sufficient discredit upon the testimony of the minority to afford the crown a pretext for imposing an amercement on them.

In the time of Fleta, a further alteration had taken place in this part of the law; for it was then in the election of the judge, either to afforce the assize by adding others, until twelve were found who were unanimous; or to *compel* unanimity among the original jurors, by directing the sheriff to keep them without meat or drink, until they were all agreed in their verdict. Fleta, lib. iv. c. 9, § 2. The first alternative has long since fallen into disuse; and the other is the settled law of the country.

I have been the more particular in tracing these several changes of the law, because Mr. Reeves in his invaluable history seems to speak of the practice in this respect as the same in the time of Glanville as it was in that of Bracton, (Hist. of the Law, vol. ii. 267,) and the reader cannot fail to have remarked this material difference, that, in the time of Glanville, the afforcement, as it was afterwards called, was applied to the original jurors generally, without reference to the number on either side of the division between them; whereas, when Bracton wrote, it was applied only to the majority, and according to the number of the dissentients, who were looked upon in some sort in the light of offenders.

In criminal cases, unanimity among the jurors has never been dispensed with; and, except in the short practice which obtained of taking the verdict *ex dicto majoris partis juratorum*, the concurrence of twelve men in the same judgment has, in civil cases also, been holden necessary to the validity of the verdict. Unanimity was strenuously insisted upon, as essential to the constitution of the trial by jury, by the great law lords, on a late occasion; I mean upon the debate on the bill, which afterwards passed into an act, (55 G. 3, c. 42,) *to facilitate the administration of justice in Scotland, by extending the trial by jury to civil causes;* and that statute, though it softens the compulsory process by limiting its duration, yet takes care to preserve the principle; for it enacts by § 34, that all verdicts shall be given *by the whole number of the jury agreeing in the verdict;* while it provides in the next clause, that, if the jury shall not agree in their verdict within the space of twelve hours from the time they shall be enclosed to consider of it, they shall be discharged by the Jury Court from delivering it; at the same time, if the *whole* number of the jury so enclosed to consider of their verdict, shall *agree* to apply to the Jury Court for further time to consider of it, that court is authorized to grant such further time beyond the period of twelve hours as such jury shall desire.

It would appear from the *Regiam Majestatem*, that the trial by jury in civil causes formerly prevailed in Scotland. The author, in speaking of the mode of adding to the jurors where there was a difference between them, uses the very words of Glanville. Though this book is of very doubtful authority, and has been considered by some of the greatest Scottish lawyers as no part of the law of Scotland; yet there seems to be no doubt but that the trial by jury in civil cases did exist at one time in that country. It has been supposed that the institution of the court of session may have contributed to bring it

into disuse, and that the number of the judges in that court, *fifteen*, with the power of appeal to the parliament of Scotland formerly, and now to the House of Lords, may, in a very great degree, have indemnified the nation in the loss of juries in civil actions.—See Historical Law Tracts, vol. i. p. 410, where the disuse of trials by jury in civil causes in Scotland is attempted to be traced and accounted for.

According to the sense in which Britton is interpreted by Mr. Kelham, even in a criminal case, if the jurors did not all agree, the opinion of the greater number was to be followed. But no other author speaks of a verdict being taken in such case without the concurrence of all the jurors; Fleta expressly requires this unanimity; and how far this exposition is justified by the language of Britton will be seen by comparing them. "Et si ils ne se poient accorder a une voluntera," says Britton, "si soient seuerés, et examinés par quoi ils ne poient avener, ét si la greynure partie se tiendra, et si ils dient sur lour serments que ils ne sevent rien del fait, soient mys autres que le sevent." Britt. c. 4. Mr. Kelham's translation of this passage is as follows: "And if they cannot all agree in one mind, let them separated, and examined why they cannot agree; and if the greater part of them know the truth, and the other part not, judgment shall be according to the opinion of the greater part. And if they declare on their oaths, that they know nothing of the fact, let others be placed in their room who do know it." Kelh. Tr. p. 41—43.——In Scotland, where the juries consist of fifteen, a bare majority of voices acquits or condemns the prisoner. But the minority have also the privilege of recording their reasons of dissent; a practice similar to that which obtained, as we have seen above, in this country in the time of E. 1. It is uncertain whether the number of fifteen arose from the same number of judges in the Court of Session, or whether the members of that court were appointed to be fifteen in imitation of the jury. Of old, juries in Scotland consisted of the number of twelve. See *Leges Burgorum*. βA judgment was reversed, where it appeared that the case had been tried by thirteen jurors. Whitehurst v. Davis, 2 Hayw. 113.*g*

β In a criminal case, where there are several defendants, if the jury have agreed as to their verdict as to one or more of them, their verdict as to them ought to be taken, although they cannot agree as to the rest.

Com. v. Cook, 6 S. & R. 577.

The court may discharge a jury in a capital case, only when there is absolute necessity; to constitute which, some other ingredient is requisite besides mere inability to agree.

Comm. v. Clue, 3 Rawle, 498.*g*

If the jury say they are agreed, the court may examine them by poll; and if in truth they are not agreed, they are fineable.

2 Hal. Hist. P. C. 299. β The jury may be polled by either party at any time before the verdict is recorded. Fox v. Smith, 3 Cowen, 23; Goodwin's Trial, 18 Johns. 188.*g*

It seems to have been anciently an uncontroverted rule, and hath been allowed even by those of the contrary opinion, to have been the general tradition of the law, that a jury sworn and charged in a capital case cannot be discharged (without the prisoner's consent) till they have given a verdict; and notwithstanding some authorities to the contrary in the reign of King Charles the Second, this hath been holden for clear law, both in the reign of King James the Second, and since the Revolution.

2 Hawk. P. C. c. 47, § 1, and several authorities there cited; and vide 2 Hal. Hist. P. C. 294, 295; Fost. 22, Sir John Wedderburn's case.

‖But if, during the trial of a prisoner for felony, one of the jury be taken ill, so as to be incapable of proceeding to verdict, that jury may be discharged, and the prisoner tried by *another* jury. And if the remaining eleven be re-sworn to try the prisoner, as they may be, together with the new juror, the prisoner, it seems, has the same right to challenge them as he had when they first appeared upon the former jury.

Ann Scalbert's case, Leach, 706; R. v. Edwards, 4 Taunt. 309; 3 Campb. 207, S. C. See also Dr. & St. c. 52.

(H) In what Cases and Manner to have a View.

So, if the prisoner himself fall down in a fit during the trial, the jury may be discharged, and upon his recovery he may be tried by another jury.

R. v. Stevenson, Leach's Ca. 618; Elizabeth Meadow's case, Fost. 76. β In general a jury cannot be discharged till they have agreed, but to this there are various exceptions. Necessity is a sufficient ground, Comm. v. Cook, 6 S. & R. 577; 3 Rawle, 501; but in some states whether to discharge or not seems to be a matter of sound discretion with the court. 4 Wash. C. C. R. 409; 18 Johns. 187; 2 Johns. Cas. 301; 2 Gall. 364; 9 Mass. 494. Insanity of one of the jurors is a sufficient reason for discharging a jury. United States v. Haskell, 4 Wash. C. C. R. 402. See as to the right of the court to discharge the jury in case of disagreement. The People v. Denton, 2 Johns. Cas. 275; The People v. Olcott, 2 Johns. Cas. 301; The People v. Green, 13 Wend. 55; The People v. Barrett, 2 Caines' R. 308.γ

And if the court may wholly discharge a jury in case of necessity, it may of course adjourn in such case, as, where the trial runs out into a length beyond the strength of man to bear without meat and sleep. In the case of R. v. Hardy, for high treason, before a special commission at O. B. 1794, this was done by consent; but in R. v. Stone, B. R. 1796, and subsequent cases, it was done by the court *proprio Marte;* the learned judge, who then presided, saying, he would not put it on so weak a ground as consent. *Quod necessitas cogit, defendit.*

In ejectment, the jury was charged with the evidence, and afterwards Ward, C. B., being judge of assize, *upon the petition and consent of both parties*, made a rule, that the cause, for difficulty, should be adjourned into the Bench, and that the jurors should appear in bank *tres Mich. sub pœnâ* 50*l.* to give their verdict, *si justiciariis ita placuerit.* It was moved, that this should be made a rule of court; but denied, because the judge could not adjourn the jury after they were sworn and charged with the evidence, nor inflict a penalty on the jurors.

Dawson v. Howard, 1 Ld. Raym. 129.

A jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving any verdict.

Rex v. Deacon, 1 Ry. & Moo. Ca. 27.

The withdrawing a juror by consent of parties is no bar to a future suit on the same cause of action.

Sanderson v. Nestor, 1 Ry. & Moo. Ca. 402.

The separation of the jury at night, where the trial of an indictment lasted more than one day, does not vitiate the verdict, and is no ground for a new trial, it not appearing that there was any suspicion of improper communications.

Rex v. Kinnear, 2 Barn. & A. 462.‖

(H) In what Cases and in what Manner to have a View.

At common law, in (*a*) most real actions, after the demandant had counted, the tenant might have demanded the (*b*) view of the land; or if it were a rent, or other thing, view of the land out of which it issued; and this was, that things might be reduced to a greater certainty. But because this was used often by the tenant for delay, and thereby the demandant greatly prejudiced;

2 Roll. Abr. 725, tit. *View;* 2 Inst. 480; Bro. tit. *View;* Fitz. tit. *View.* {See 1 Johns. Ca. 237, Inh. of Gravesend v. Voorhis; Ibid. 335, Haines v. Budd; Ibid. 395, Scofield v. Lodie.} (*a*) But it is said, that at common law view did not lie in a writ of dower *unde nihil habet, intrusion, breve d'entry en le quibus, nuper obiit, rationabili parte.* 2 Roll. Abr. 725; Booth, Real Actions, 38. (*b*) That there are two sorts of

(H) In what Cases and Manner to have a View.

views in real actions; 1. View by the party. 2. View by the jurors; as in assize of novel disseisin, waste, assize of nuisance, the party shall not have view, because the jurors shall have view. Booth, 38.

By (*a*) Westm. 2, c. 48, it is ordained and provided, "That from henceforth view shall not be granted but in case when view of land is necessary; as, if one lose land by default, and he that loseth moveth a writ to demand the same land; and in case when one by an exception dilatory abateth a writ after view of the land, as by non-tenure, or misnaming of the town, or such like, if he purchase another writ; in this case, and in the case before mentioned, from henceforth the view shall not be granted, if he had view in the first writs. In a writ of dower, where the dower in demand is of land, that the husband aliened to the tenant, or his ancestors, where the tenant ought not to be ignorant what land the husband did alien to him or his ancestor, though the husband die not seised, yet from henceforth view shall not be granted to the tenant. In a writ of entry also that is abated, because the demandant misnamed the entry; if the demandant purchase another writ of entry, if the tenant had view in the first writ he shall not have it in the second. In all writs also where lands be demanded, by reason of a lease made by the demandant, or his ancestor, unto the tenant, and not to his ancestor; as that which he leased to him, being within age, not whole of mind, being in prison, and such like, view shall not be granted hereafter; but if the demise were made to his ancestor, the view shall lie as it hath done before."

(*a*) 13 E. 1, st. 1, c. 48.

Since this statute, the demandant, as to any of the cases within the statute, may counterplead the view, *i. e.*, allege matter in pleading which ousts him of view; as, where he that loseth land by default brings a *quod ei deforciat* for the recovery of it, the tenant shall not have view, because he is well enough ascertained of the land by the former record. So, where view was had in a former writ, and that writ was abated after view for some mistake that appeared upon the view, as non-tenure, misnaming of the town. So, in dower, when it is brought against the same tenant that purchased the land of the husband. So, if the husband died seised, it is a good (*b*) counterplea of view in dower.

Booth, 37; 2 Roll. Abr. 726. (*b*) For this vide *Dower*, letter (1)

In an action of waste, in which it was agreed that a view should have been awarded, and that six, at (*c*) least, of the jurors should have viewed the place, it was resolved, that if a view be awarded, though not returned by the officer, and the trial go on, and a verdict had, that the omission of the officer in not returning the view is not error; for it was the duty of the court to examine whether the jury had a view or not; and if they found they had not, the trial ought to have been stayed.

2 Saund. 254. (*c*) Wherever the plaintiff is to recover *per visum juratorum*, there ought to be six of the jury that have had the view, or know the land in question, so as to be able to put the plaintiff in possession if he recover. Co. Lit. 158 b.

So, in an assize, in which it was likewise agreed, that a view was requisite in the same manner, if the officer does not return the view, it is not error; for the words of the writ are, *et interim videant*, and not *et interim haberi fac. visum;* so that the jurors might have had the view, when the officer was not present; and if it were otherwise, the party might have challenged the jury for this cause; and though the officer had returned, that the jurors had had the view, yet if, upon examination

in court, it appeared otherwise, the parties could not be concluded by such return.

2 Saund. 254, 255.

If the court make a rule, that the jury shall have a view, and that they shall not hear any evidence thereupon, (*a*) and they notwithstanding hear evidence; this is a good cause of challenge, and likewise a misdemeanor, for which, it is said, they may be punished by the court.

Palm. 363. (*a*) || It is always made a term in the rule or order for a view, that no evidence shall be given on either side at the time of taking it. But it hath been holden, that on a view, the showers may show marks, boundaries, &c., to enlighten the viewers, and may say to them, "These are the places to which we shall adapt our evidence on the trial." Goodtitle v. Clark, Barnes, 458.||

In an action of waste, it was agreed; 1. That if six of the jury are examined on a *voir dire*, if they have seen the place wasted, that it is sufficient, and the rest of the jury need not be examined upon a *voir dire*, but only to the principal. 2. It was agreed, if the jury be sworn that they know the place, it is sufficient, although they be not sworn they saw it; and although that the place wasted be showed to the jury by the plaintiff's servants, yet, if it be by command of the sheriff, it is as sufficient as if the same had been shown to them by the sheriff himself.

Godb. 209, Sir John Gage v. Smith; and vide Lutw. 1558; Leon. 267.

At the trial of a cause for want of a full jury upon the principal panel, some *talesmen* were sworn, and had the view, but the *distringas* was returnable as an original *distringas*, and so many of the original panel left out who were not at the view; of which the defendant complained, and would have set aside the trial for irregularity. But, because no *venire* appeared to the court, and the matter stood upon record as an original trial, and the want of a *venire* was helped by verdict; and because the cause was tried by those that were fittest, viz., those who had the view, the court would do nothing in it.

2 Salk. 665.

But it was ordered, that for the future, when in order to a view the last juror (*b*) is withdrawn, the plaintiff shall take out a new *distringas*, *amoto* the last man of the panel, to distrain the other twenty-three, with an *apponas etiam decem tales*.

2 Salk. 665. (*b*) At the assizes, if a view is demanded, it must be after the jury is sworn, and then by consent a juror may be withdrawn. 6 Mod. 211,—and by Holt, C. J. We (the Court of King's Bench) may award a view without consent; and notwithstanding such view, a juror may be challenged when he comes to be sworn. 6 Mod. 211.

It is said, that before the court makes a rule for a view, the *venire facias* must be (*c*) returned; and then the court may make a rule, that so many of the panel shall view the premises.

2 Salk. 665, pl. 3, *per* Holt, C. J. (*c*) That a jury is never ordered to view before their appearance, unless in an assize. Mod. 41.

A view is grantable in such cases where the title is in question; and in such cases it may be granted on motion, on a bare suggestion, without any affidavit.

2 Salk. 665, pl. 1, *qu.* || In actions of *waste*, and trespass *quare clausum fregit*, says Mr. Tidd, the necessity for a view in general appears on the face of the pleadings; and in other cases the motion for it is become a motion of course in the King's Bench, requiring only counsel's signature; upon which a rule of court is drawn up in term time, or a judge's order in vacation. But, in the Common Pleas, it is said, that a rule for a view is never granted without an affidavit in any case, except in an action of waste, Barnes, 467; and therefore in other cases an application must be made for the

rule, to the court in term time, on an affidavit of the circumstances; and in vacation, a judge's order for it cannot be obtained without the consent of the opposite attorney. Imp. C. P. 399. In the Exchequer, the court will not grant a view of the premises, where the question may be tried by the production of a model. Attorney-General v. Green, 1 Price, 130; Tidd's Pr. 843, 844.‖

And to this purpose it is enacted by 4 Ann. c. 16, § 8, "That in any actions brought in any of her majesty's courts of record at Westminster, where it shall appear to the courts in which such actions are depending, that it will be proper and necessary that the jurors, who are to try the issues in any such actions, should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trial of such issues, in every such case, the respective courts in which such actions shall be depending may order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff, or such other officer, to whom the said writs shall be directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question some convenient time before the trial, who then and there shall have the matters in question shown to them by two persons in the said writs named, to be appointed by the court; and the said sheriff, or other officer, who is to execute the said writs, shall, by a special return on the same, certify that the view hath been had according to the command of the said writs."

[Upon this statute, it had become the practice to grant a view of course, upon the motion of either party: and a notion having prevailed, that six of the first twelve upon the panel, must attend upon the view, and that if they did not appear at the trial, the cause must be put off, the Court of King's Bench thought it their duty to interfere, and to take care that their ordering a view should not obstruct the course of justice, and prevent the cause from being tried; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed for a great length of time. Accordingly they resolved not to order a view any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms as might prevent an unfair use from being made of it. Agreeably to this resolution, they required a consent, which has ever since been made a part of the rule, that in case no view be had, or if a view be had of any of the jurors, though not six of the first twelve, yet the trial shall proceed, and no objection be made on either side, on account thereof, or for want of a proper return to the writ. 1 Burr. 252; Tidd's Pr. 521.]

And by the 3 Geo. 2, c. 25, a provision is made for a view, in the following words: "That where a view shall be allowed in any cause, that in such case six of the jurors named in such panel, or more, who shall be mutually consented to by the parties or their agents on both sides, or, if they cannot agree, shall be named by the proper officer of the respective Courts of King's Bench, Common Pleas, or Exchequer, at Westminster, or the grand sessions in Wales, and the counties palatine, for the causes in their respective courts, or, if need be, by a judge of the respective courts where the cause is depending, or by the judge or judges before whom the cause shall be brought on to trial respectively, shall have the view, and shall be first sworn, or such of them as appear upon the jury to try the said cause, before any drawing as aforesaid; and so many only shall be drawn, to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve to be sworn for the trial of such cause."

‖In a criminal prosecution there can be no view without consent; and such was the practice before the 4 Ann. c. 16.

R. v. Redman, 1 Keny. Rep. 384.‖

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable, and aided after Verdict.

HERE we may lay it down in general, that by the express words and intent of the several statutes of jeofail and amendments, all irregularities as to the number, qualifications, and returns of the jurors are aided after verdict, so that the *venire* be of the same place, and in the same action, and between the same parties.

Gilb. Hist. C. P. 174. Vide tit. *Amendment and Jeofail.*

So, if there be no *venire facias;* or if there be such a fault in the *venire* as makes it a perfect nullity, so that it has no relation to the cause; yet, if there be a good *distringas*, that being one of the jury process, the omission of the former is cured; for the omission of any judicial writ is aided by the statutes, and a *venire*, that is a nullity, and has no relation to the cause, is as if there had not been any, and so of a *distringas* where there is a proper *venire.*

Gilb. Hist. C. P. 177—181. Where the want of a *venire distringas*, &c., is aided, but not a vitious one, and where a vitious one shall be taken as none, vide Cro. Eliz. 483; Owen, 59; Moor, 465; Noy, 57; Moor, 684, pl. 535, 623, pl. 852, 696, pl. 967; Godb. 194; Leon. 329; Buls. 130; 3 Buls. 180; Brownl. 78, 97; Yelv. 69; Roll. Rep. 22; Jon. 304; Latch. 116; Yelv. 109.

So, if the award of a *venire facias* upon the roll be well, and the writ of *venire facias* wrong, yet this shall be amended by the roll, being the (*a*) warrant of the writ, which is the act of the court, and the default is only the mistake of the clerk.

2 Roll. Abr. 201; Moor, 599, pl. 826, S. P. (*a*) So, where the award upon the roll was in a cause against two defendants, but the *venire* against one, and amended. 3 Buls. 311—and vide Winch. 73; Cro. Jac. 78.—But, if by the roll the *venire* is awarded *de vicineto* of the right place, but the *venire* itself is of a wrong, and thereupon a jury is returned, and tries the cause, it shall not be amended; for it appears that the trial was not had by such a jury as the roll and law require. Hob. 76, and vide Lit. Rep. 253.——So, if there be no place on the roll to warrant the *venire.* Latch. 194.——Also, in criminal cases, to which the statutes of amendment do not extend, the *venire's* omitting any of the parties is error. 2 Hawk. P. C. c. 27, § 98.

So, if the writ of *venire facias* out of the King's Bench, be *venire facias* 12 *liberos et legales homines coram nobis apud Westmonasterium ubicunque fuerimus in Angelia;* but the roll is well, (the words *apud Westmonasterium* being omitted therein,) this being in B. R. the writ shall be amended by the roll; for this is but matter of form.

Cro. Eliz. 467; Noy, 57; Owen, 59.

If the return of the *venire* be mistaken, this may be amended by the roll; and if the *teste* of the *venire* be out of term, or before plea pleaded, it is no error; for the *teste* of judicial writs being only matter of form, if mistaken, shall not vitiate, since they have the proper judges of the fact by such process.

Yelv. 64; Moore, 699; Cro. Car. 9.

Therefore if a *venire facias* be dated 7th July, and made returnable 6th July, a day before the date of the writ, this after verdict is amendable because a judicial process, and the default of the clerk.

Cro. Eliz. 203, 467; Cro. Car. 38; Moore, 465, pl. 657.

So, if a *venire facias* be awarded upon the roll, to be returned *Octabis Trinitatis*, and the writ is made returnable six days after, *scilicet*, a day out of term; but the *distringas* is well without any fault; and after the jury empannelled find for the plaintiff; this writ of *venire facias* shall be amended

by the roll; for this was the default of the clerk only; for the roll is the warrant of the writ.

Cro. Car. 38; Lit. Rep. 54; Cro. Ja. 64; Cro. Eliz. 760; Moore, 696, pl. 967, 711, pl. 998.

The award of the *venire* must be to a day in the same term, or to the next term, but it must be in term, otherwise it is erroneous; because this is not such (*a*) a discontinuance as is aided by the statute, since it is an error in the court by awarding the process, which makes it utterly uncertain when or where the parties should appear to receive judgment, and it is an act of the court, which is erroneous; and not a mis-entry of the clerk, which the statutes do not intend to aid.

Moore, 465, pl. 657. (*a*) *Venire* returnable on the 23d of January, and *distringas* tested on the 24th, held a discontinuance, and being in a criminal case, not amendable. Buls. 141, 142; Yelv. 204; Cro. Ja. 283; 6 Mod. 281; Salk. 51, pl. 14; Ld. Raym. 1061; 2 Salk. 669, pl. 1; 6 Mod. 268.

If the place be totally (*b*) misawarded, this is not helped by any statute, because they have not the proper *judices facti*, unless they have them from the place where the fact arises. But, if it is only misawarded in part, this is helped by the express words of (*c*) 21 Ja. 1, c. 13, because it is supposed that the persons that were near any part of the place might know the fact in issue between the parties; and by the statute of (*d*) 16 & 17 Car. 2, c. 8, the want of a right *venue* is aided, so as the trial was by a jury of the proper county or place where the action is laid.

(*b*) Where mis-trials by the *venue* not being awarded of a right place, were not aided by any of the statutes of amendment before 21 Ja. 1, vide Cro. Eliz. 468; Gouls. 38, 47; Winch. 69; 4 Leon. 84; Cro. Ja. 647; Moore, 91, pl. 212; Lit. Rep. 365; Keilw. 212; 5 Co. 36. (*c*) For this vide Cro. Car. 17, 162, 284, 480; Jon. 365; Styl. 201, 206; Raym. 67.—That this statute aids not unless the *venue* arises from several places, and one of those places is truly named. Sid. 20.—But, if it arise from several places, though in several counties, and it is tried by one only, it is helped. 2 Lev. 122, *per* Hale.—By the opinion of the greater part of the judges, where by particular custom a trial was to be *de vicineto* of the four wards next adjoining, and the *venire* is awarded *de vicineto* of two of them only, it is helped by the statute. 2 Saund. 258. But Saunders *dubitavit*, whether it should extend to aid any proceedings except such as were according to the course of the common law. (*d*) That this statate does not extend to any trial in an improper county. Mod. 37, 199; 2 Mod. 24. But for the exposition of the statute as to this point, vide Lev. 207; Sid. 326; 2 Lev. 122, 164; Saund. 247; Raym. 181, 392; Vent. 263, 272; 2 Keb. 496; 2 Jon. 82; ‖ 1 Ld. Raym. 330; Carth. 448; 2 Ld. Raym. 1212, 1455; 2 Str. 727; Willes's Rep. 431; 7 T. R. 583, the result of which seems to be, that it extends as well to cases where the cause has been improperly tried in a wrong county, as to those where there is a wrong *venue* in a right county. But where, in ejectment for lands in Cardiganshire, the *venue* was awarded out of Shropshire, upon a suggestion of its being the next English county, the court, after verdict for the plaintiff, arrested the judgment on the ground of a mis-trial, Herefordshire being the next adjoining English county to South Wales; although it appeared that Shropshire was in fact nearer to the lands in question, and the cause was more conveniently tried there than it could be in Herefordshire. Goodright v. Williams, 2 M. & S. 270.‖

If there be a blank left for the county to the sheriff whereof the writ should be awarded, yet it will be amended; because it cannot be awarded to the sheriff of any other county, and therefore it is the omission of the officer in entering the award of the court. But, if there were a local plea into another county, so that there are two counties mentioned in the pleadings, there the blank cannot be amended, because there is originally no award of the court to whom the process shall go. But, where the plea carries the matter into another county, there the *venire* must be from the last place, because the declaration by such plea stands confessed.

Yelv. 169; Cro. Eliz. 261, 468.

(I) What Irregularities in convening are amendable.

After issue joined, if upon the roll a *venire facias* be awarded to the sheriff of the county of Somerset, &c., and upon this a *venire facias* be made in this manner, *Carolus Dei gratiâ Somerset salutem*, &c., leaving out the word (*vicecomiti;*) and upon this the sheriff of Somerset returns a jury, and thereupon a verdict, &c., this shall be amended by the roll, because this was the fault of the clerk merely, having the roll before him when he made the writ, by which he was directed to direct the writ to the sheriff of Somerset.

Roll. Abr. 205, Child and Sloper; Cro. Car. 595, S. C.; Yelv. 64, S. P. cited.

If the court on an insufficient suggestion awards the process to an improper officer, yet this is aided after verdict; for that only makes an insufficiency in the return of the jury, and insufficient returns are aided; for it was the design of the (*a*) statute, that if the cause was tried by a right jury, it should not be material what officer got them together.

(*a*) But where before the statute of 21 Ja. 1, c. 13, the award of a *venire* to a wrong officer, and his return thereupon, was error, vide Brownl. 134; Cro. Eliz. 574, 586; Moore, 356, pl. 482; Yelv. 15; 5 Co. 36 b.

But if, on a suggestion of the roll, process be awarded to the coroner, and the sheriff return either the panel or the *tales*, it is said to be erroneous, because not collected by the proper officer, and therefore they are not the *judices facti* of that cause; and it appears on the record that the return is otherwise than the court hath directed.

Cro. Eliz. 181, 586, 674.

But the latest resolution is, that the returns of ministerial officers are to be challenged at the day of the return; for if the court then admits them to be their officers, and the parties do not except against them, they are concluded, since the proper *judices facti* are admitted by them to be returned.

Salk. 265, pl. 9; Andrews v. Lynton, 2 Ld. Raym. 884.

If a *venire* is awarded to the coroners, and returned by two of them only, whereas at the time of the award and return thereof there were two more, this is only a mis-return, and aided.

Cro. Ja. 483; Hob. 70; Lamb and Wiseman, adjudged.

But it is said, that if one sheriff of (*b*) London makes a return without the other, this is not helped, being no return at all; for they make but one officer, and the court knows that one sheriff there is two persons.

Hob. 70. (*b*) In an action, if the *venire facias* be *vicecomiti London. salutem*, &c., *præcipimus tibi quod*, &c., where it should be *præcipimus vobis*, after verdict this shall be amended; for it is the default of the clerk. Owen, 62; Cro. Eliz. 443; Roll. Abr. 200.

If upon the return of the *habeas corpora* the surname of the sheriff be omitted, as where his name is Bartholomew *Michel*, and it is returned Bartholomew *Miles*, sheriff, this shall be amended.

Hob. 113; Roll. Abr. 204; Cro. Eliz. 310.

It was holden, that if before the statute of 21 Ja. 1, c. 13, the sheriff did not return the writ of *venire;* or set his name on the back thereof; or omitted inserting *quod executio istius brevis patet in quodam panello huic brevi annexo;* but it was *album breve;* it could not be amended upon examination of the sheriff, being the (*c*) principal process. But this is now helped by the statute, so that a panel of the jurors be returned and annexed to the writ.

3 Buls. 220; Cro. Ja. 528; Noy, 115; 5 Co. 41; Cro. Eliz. 587; Brownl. 43.

(I) What Irregularities in convening are amendable.

(*c*) But even before the statute 21 Ja. 1, c. 13, it was holden that the *venire*, being well returned, though the issue be tried on the *habeas corpora* or *distringas*, which are not returned, or irregularly returned, in manner aforesaid, the *venire* being the principal process, and right, the others should be amended. Moor, 868, pl. 1203; Hob. 130; Yelv. 110; Cro. Ja. 188, 443; Cro. Eliz. 466, 704; 2 Roll. Rep. 111, 210.

If the sheriff that returns his *venire* be discharged before the *teste* of the *venire*, it is error, and shall be tried by the record of his discharge; because, if the legal officer did not return the writ, the proper *judices facti* did not try the cause, and so the verdict is ill.

Cro. Car. 421.

But, if he be sheriff at the time of the award of the *venire*, and after his discharge he return the panel to the *venire*, this is no (*a*) principal cause of challenge; for the sheriff having returned the *nomina jurat.* to the court above on the *venire*, on which they have awarded a *distringas* with a *nisi prius*, the sufficiency of that return is not to be controverted before the judge of *nisi prius*, but above, since the judges of *nisi prius* are bound down by a record of a superior court, on whose records it appears he is sheriff.

Cro. Eliz. 369, Hore and Broom. (*a*) But this may be challenged for favour, and the illegality of the officer will be admitted as strong evidence of a partial array, since a person who had nothing to do with the return has intermeddled therewith; and accordingly the array in this case was challenged for favour, and quashed.

The jury must come in the same action, and between the same parties, otherwise they are not judges in that cause; therefore in ejectment, where the *venire* was *de placito transgressionis*, omitting *et ejection. firmæ*, the court held the *venire* to be ill, because it was not in the same action; for an action of trespass and ejectment are different, and there might be an action of trespass between the same parties. But, if the *distringas* had been right, they would have adjudged this *venire* to be null, and the want of a *venire* is aided by the statute.

Cro. Car. 32; Hutt. 81; John. 302; Godb. 194; Cro. Ja. 528; Cro. Eliz. 259.

If an action of trespass issue is joined between the plaintiff and two defendants; and one dies; and the *venire* is awarded between the plaintiff and both defendants, after such defendant's death; and verdict is taken for the plaintiff; and the death suggested on the roll; and judgment against the survivor; the *venire* being only a judicial process, and pursuing the award on the roll, it plainly appears to be the same cause, and that the trial was had by proper judges; and judgment being given against the defendant, who is charged with the whole action, it is good.

Cro. Car. 426; Jon. 367, Piffin v. Fenton.

If the *jurata* mentions the issue to be *de placito transgressionis* where the action is debt, and the award of the *venire* and *distringas* debt, this shall be amended; for the *jurata* is an award of the *distringas*, in pursuance of the award of the *venire;* and the *venire* being right, the (*b*) secondary process ought to be made accordingly, and there is a sufficient authority by the writ of *distringas* for the judge of assize to try the cause.

Cro. Car. 275. (*b*) That the award on the roll being right, shall amend the *venire*, and the *venire* being right shall amend the *distringas*, which is the proper process for convening the jurors in the King's Bench. So, of the *habeas corpora*, which is the Common Pleas' process. Lit. Rep. 252, 253.—Also, if a *distringas* is awarded where it should be a *habeas corpora*, this is aided. Savil, 37.

So, if the sheriff return *nomina jurat. inter partes prædict. de placito transgressionis*, where the *venire* is *de placito debit.*, this shall be amended;

for *in dorso brevis*, he says, *executio istius brevis patet*, &c., which could not be, if it was not in the same action.

Cro. Car. 275; Roll. Abr. 202.

If the day when, and place where, the assize was to be holden, is not mentioned in the *distringas*, it shall be amended by the roll; for if there had been no *distringas*, the trial had been good, because the *jurata* is the warrant to try the cause, and that was right.

3 Mod. 78, Jackson and Warren.

In ejectment against seven defendants, who entered into the common rule, and pleaded to issue, the plea roll, *venire distringas* and *jurata* were right, but the issue on *nisi prius* roll was between the plaintiff and five defendants only. After verdict for the plaintiff this was amended; for the lessor's title was the gist of the action, and the only thing inquirable of by the jury.

Salk. 48, pl. 5.

If the (*a*) number or (*b*) qualifications of the jury, as has been said, be omitted, it may be amended; for it is but form to award the particular number and qualifications in each roll, which is directed by the law in all cases.

(*a*) If a *venire facias* be *et habeas ibi hoc breve*, without these words, *nomina juratorum*, this will be aided after verdict, being a judicial writ; though objected, that these words were of necessity and without which the court could not know who are the jurors, nor whom to demand to be sworn. 3 Buls. 208; Roll. Abr. 200, 204; Cro. Eliz. 467; Moor, 465, 657; Noy, 57; 2 Brownl. 167.——So, if the word *duodecim* be left out of the *venire facias*, this shall be amended after verdict. Roll. Abr. 204. (*b*) If a *venire facias* be *quorum quilibet quatuor libras terræ*, omitting the word *habeat*, this shall be amended after verdict. Roll. Abr. 204.——So, if the words *quorum quilibet* are omitted out of the *venire facias*, it shall be amended after verdict. Roll. Abr. 204.——So, if the words *qui nullâ affinitate attingunt* are left out of the *venire facias*, it shall be amended. Roll. Abr. 204.

The *nomina juratorum* on the *venire* are the proper parties to try the action; and if there be a mistake in the (*c*) Christian name, it is incurable; for the statute does not extend to it, but it extends to cure surnames and additions; for there can be but one name of baptism, but there may be various surnames and additions; and therefore if it can be proved what person the sheriff meant by his surname or addition, it may be amended and set right.

(*c*) For the diversity, where the Christian and where the surname is mistaken, vide Displyn v. Pratt, Cr. El. 57; Fermor v. Dorrington, Ibid. 222; Downes v. Winterflood, Cr. Car. 203; Blunt v. Snedston, Cr. Ja. 116.

Also, if either the Christian or surname be wrong in the body of the *distringas*, or in the panel returned, or in the panel of the jury sworn; yet, if it can be proved to be the same man that was intended to be returned in the *venire*, having there his right Christian name, he is the proper *judex facti*, and it may be amended by the statute.

Roll. Abr. 196, 197, Hob. 64; Brownl. 174.

As, if *Tippet* be returned in the *venire facias*, and in the *habeas corpora* and *distringas juratores* he is named *Typper;* yet, if his true name be Tippet, according to the *venire facias*, and *Tippet* is sworn, and tries the issue, it shall be amended.

Roll. Abr. 196, and vide Dan. 330, 331, several cases to this purpose.

|| Where one of the jurors was named *Henry* in the *venire*, the *habeas corpora*, and the *postea*, his real Christian name being *Harry*, the Co[illegible]

Common Please refused on that account to set aside the verdict and grant a new trial.

Wray v. Thorn, Willes, 488; Barnes, 454, S. C.

Where the son of a juryman summoned and returned, had answered to his father's name, when called on the panel, and served, without objection, as one of the jury on the trial of the cause; the Court of King's Bench, after consulting with the other judges, held that this was not of itself a sufficient ground for setting aside the verdict as for a mis-trial.

Hill v. Yates, 12 East, 229. But see Norman v. Beaumont, Willes, 484; Barnes, 453, S. C., *contra.*

But in a later case, where a person, who was not summoned on the jury, answered in the name of one who was, and served in his stead, the Court of Common Pleas awarded a *venire de novo.*

Dovey v. Hobson, 6 Taunt. 460; 2 Marsh. 154, S. C. The court distinguished this case from that of Hill v. Yates, by saying that *there* the objection came too late, not being made till after the trial; *here* it was made at the trial, and the plaintiff took the verdict at the peril of not being able to hold it. But *qu.* the case of Hill v. Yates, and the difference whether the discovery were made after or before the verdict? ||

If the sheriff returns but twenty-three on the *venire*, and twenty-four on the *habeas corpora*, and the twenty-fourth omitted on the *venire* appears, and is sworn, the verdict is ill, because he has not returned according to the award of the court, in pursuance of the *venire*, and therefore has no authority to try the cause; for the award to distrain one not summoned is void, and he is not returned of the *tales de circumstantibus*, so that he is not a proper juror by the writ nor statute. ||But, if twelve of the twenty-three be sworn, and not the twenty-fourth, it is aided by the 18 Eliz.||

Gilb. Hist. C. P. 173; Jon. 302, Fines v. North; Cro. Car. 278, S. C. adjudged.

So, if twenty-five are returned, and the twenty-fifth is sworn, and tries the cause, it is not helped.

Calthorp v. Newton, Cro. Ja. 647.

But, if the twenty-fourth man had not been of the twelve that tried the issue, it would be aided by the statute; or if the trial had been by eleven of the twenty-three, and one of the *tales de circumstantibus*, it had been good.

Cro. Car. 223, 278; 5 Co. 36 b, 37 a; Cro. Eliz. 104; Brownl. 274; Jon. 357; Sid. 66; Latch. 57.

||Where there were but twenty-four returned on the panel annexed to the *venire facias*, but there were forty-eight upon the *habeas corpora*, upon which the defendant made no defence; the Court of Common Pleas, upon motion, set aside the verdict without costs, saying that the 21 Ja. 1, means only the formal words upon the writ; for there must be a panel annexed to the return.

Brown v. Johnstone, Bull. N. P. 324.||

[It is no objection that the jury were not summoned on the *venire*, or attached on the *distringas*, for there can be but one general return since the balloting act, 3 Geo. 2, c. 25: besides, the want of a return is cured by the appearance of, and trial by, a proper jury.

Phillips v. Phillips, Andr. 248.]

|| On the trial of an information for libel only ten special jurymen appeared, and two talesmen were sworn on the jury. It is no ground

(L) When, and by whom to be paid.

for a new trial that the two non-attending special jurors were not summoned, although this fact was unknown to the defendant at the trial.

The King v. Hunt, 4 Barn. & A. 430.

The son of a juror summoned and returned having answered to his father's name when called on the panel, and served as one of the jury on the trial of the cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial.

Hill v. Yates, 12 East, 229.

But where the son was not of age and not qualified, the court granted a new trial.

Rex v. Tremearne, 5 Barn. & C. 254.

So also where the objection was taken *before verdict.*

Dovey v. Hobson, 2 Marsh. 154.

Alienage is a ground of challenge to a juror; but if the objection is not made at the trial, it is too late after verdict.

Rex v. Sutton, 8 Barn. & C. 417.‖

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.

HERE we may lay it down as a general rule, that all defects in convening, or in the qualifications of the jurors, are aided by consent of the parties; for the rule herein is, that *omnis consensus tollit errorem.*

Co. Lit. 125 b; Dyer, 367 b, pl. 40.

Therefore if a *venire facias* be awarded to the coroners, where it ought to be to the sheriff; or the visne come out of a wrong place; if it be *per assensum partium*, and so entered of record, it will stand good.

5 Co. 36 b; Co. Lit. 125 b; 2 Roll. Rep. 21; Godb. 428; Noy, 107.

One of the jury, after he had been sworn, and after he had heard part of the evidence, fell sick, and another being sworn in his place by consent of plaintiff and defendant, it was holden a good verdict.

Palm. 411.

(L) When, and by whom to be paid.

JURORS in all civil causes are to be paid for their trouble, and attendance, and the (*a*) *quantum* is to be proportioned according to the distance of place, badness of the weather, &c. But, if they take any money, or other reward, for giving a verdict, they are not only punishable at common law by fine and imprisonment, but to a *decies tantum* given by the statute of 38 E. 3, c. 12, i. e. a forfeiture of ten times as much as he hath taken.

Carth. 242. (*a*) That in strictness on a trial at *nisi prius* in the same county, they are only entitled to 8*d.*, and to 5*l.* on a trial at bar, where they come out of a foreign county. Trials per Pais, 62, 216.

But, if some of the jurors appear, and the trial goes off *pro defectu juratorum*, those who appeared are not to be paid; for nobody has received any benefit from their attendance, and, consequently, not obliged to make them any recompense.

2 Lil. Regist. 157.

But, where a cause was appointed for trial at the bar of B. R., by a jury of Wilts, and a *venire* returned, and the jury summon, but before the day the parties agreed, and the summons not being countermanded, several of

the jury appeared; it was ordered on motion, that the attorneys on both sides should pay them.

2 Show. 248, pl. 252.

So, if the jury find a special verdict, the charges of the jury shall be equally borne by both parties.

2 Leon. 174, 175, for what costs shall be paid upon praying a special jury, see 24 Geo. 2, c. 18; and for what fees allowed to jurymen, see § 2, of the same statute, *supra*.

(M) For what Misdemeanors punishable: And herein,

1. *Where punishable by Attaint.*

THE jury when empannelled judged under the penalty of an attaint by the old law, which was the only curb they had over juries. But this method, from the difficulty of attainting the jury, and severity of the punishment, has been seldom used of late; and the practice of granting new trials, where the jury find against evidence and the direction of the court, introduced in the room thereof. But, since the attaint is only disused, and not taken away, we shall here set down the most considerable matters relating thereto.

Glan. lib. 8, c. 9; 2 Inst. 130; Co. Lit. 394.

But herein, first, we must observe, that the judgment in attaint being so severe, all manner of evidence was admitted in support of the verdict; but against the verdict they admitted none that was not given at the former trial; because the jury might give in their verdict, not only on the evidence given in court, but on their own knowledge; and therefore (*a*) whatever otherwise they came to the knowledge of, they might give in evidence for the support of their verdict. But the evidence not offered on the trial can never be brought against them, because such evidence might have altered their judgment, had it been given; and the want of that light, which the party neglected to offer, cannot convict them of a falsity, which, if it had been offered, might have founded a different verdict.

Roll. Abr. 285; Bro. *Attaint*, 87; Dyer, 53, pl. 14; Dyer, 369; Godb. 271. Hob. 227. (*a*) But then the plaintiff, in attaint, may have an answer thereto, and disprove it as well as he can; but he cannot give other evidence, nor enforce the first evidence with more matter than was given and disclosed before. Dyer, 212, pl. 34.

The jury may be attainted two ways; 1st, Where they find contrary to evidence. 2dly, When they find out of the compass of the *allegata*. But to attaint them for finding contrary to evidence is not so easy, because they may have evidence of their own conusance of the matter before them; or they may find on (*b*) distrust of the witnesses, on their (*c*) own proper knowledge.

Gilb. Hist. C. P. 128; Roll. Abr. 281, 282. (*b*) Where the evidence of a witness is false in an immaterial part, the jury need not give him credit in any other part. Cro. Eliz. 310. (*c*) If a jury give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give. Salk. 405, pl. 3. ‖ For certainly it is of dangerous consequence to receive a verdict against evidence, given on supposal that some of the jury knew otherwise, or on private information given by any juryman to the rest, where he cannot be cross-examined. Tr. per Pais, 258. And it was the opinion of Buller, J., that where a juryman has knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privately to the rest of the jury, but should state to the court, that he has such knowledge, and thereupon be examined, and subjected to cross-examination. 6 How. St. Tr. 1012, (n). So in the case of Bennet and the Hundred of Hertford, it was said by the court, that if either of the parties to a trial desire that a juror may give evi-

dence of something of his own knowledge to the rest of the jurors, the court will examine him openly in court upon his oath, and he ought not to be examined in private by his companions. Sty. 233.‖

But, if they find upon evidence that does not prove the *allegata*, there it is easy to subject them to an attaint; because it is manifest that what is so found is on evidence not corresponding to their issue. And hence it is necessary that the matters in issue should be set forth with all convenient certainty, that it may be seen how far and when the jury are mistaken; as in trespass, the quantity and value of the thing demanded must be so conveniently described, that if the jury find damages beyond such quantity and value, it may be apparently excessive, and they subject to the attaint. And so on special contracts, they must be set forth so precisely, that if evidence be given of another contract, and not that in the allegations, and yet the jury find for the plaintiff, they may be subject to an attaint.

Gilb. Hist. C. P. 128; Roll. Abr. 282.

An attaint does not lie in a criminal case, as it does in a civil. And the reason of the difference, according to Hawkins, is, that in the last case a man's property only is brought into question a second time, and not his liberty or life; and also, says he, it may be generally presumed that a jury is likely to be equally influenced with the fear of an attaint from either of the contending parties; whereas if any such examination of their proceedings were allowed in criminal causes, they might be often in great danger of one side, by incurring the resentment of a powerful prosecutor, and provoking him to call their conduct in question, for their supposed partiality; but they could have little to fear from an injured criminal, who would seldom be in circumstances to make his prosecution formidable.

Vaugh. 146; 1 Hawk. P. C. c. 72, § 5. But by 2 Hal. Hist. P. C. 310, the king may have an attaint; for although a man convicted upon an indictment can have no attaint, because the guilt is affirmed by two inquests, the grand inquest that present the offence on their oaths, and the petit jury that agree with them; yet where the petit jury acquit, it stands as a single verdict; for they disaffirm what the grand inquest of twelve men have upon their oaths presented.

Where the king is sole party against the subject, and the jury find for the king, no attaint lies; but it is otherwise where the suit is *tam pro domino rege quam pro seipso*, [and the verdict passeth against the king.]

4 Leon. 46. But for this vide Cro. Eliz. 309; 2 Jon. 14.

No attaint lies upon an inquest of office; therefore if a recovery be in a *quare impedit* by default, and a writ issue to the sheriff to (*a*) inquire of the damages and plenarty, no attaint lies upon this inquest; for it is but an inquest of office.

Co. Lit. 355 b; Vaugh. 153; 11 Co. 6 a; Roll. Abr. 280, and several Year-Books there cited. 10 Co. 119, S. P. (*a*) Therefore, where the matter omitted to be inquired by the principal jury is such as goes to the very point of the issue, and upon which, if it be found by the jury, an attaint will lie against them by the party, if they have given a false verdict; there, such matter cannot be supplied by a writ of inquiry, because thereby the plaintiff may lose his action of attaint, which will not lie upon an inquest of office. Carth. 362; Ld. Raym. 59; 5 Mod. 76, 77, 118; Salk. 205, pl. 3; Skin. 595, pl. 8; 12 Mod. 85.

But, if the inquiry be by the same inquest that inquired of the issue in the *quare impedit*, an attaint lies.

Roll. Abr. 280; 10 Co. 119.

So in an assize, if they are at issue upon the plea in bar and that is found

for the plaintiff, and it is inquired over of the seisin and disseisin; if the disseisin be found by a false verdict, an attaint lies thereupon.

Fitz. *Attaint*, 15; Roll. Abr. 28; 10 Co. 119.

In an action against tenant in tail, if he makes default, and he in the reversion prays to be received, supposing him to be tenant for life, which is counterpleaded; upon which they are at issue, and it is found against him in reversion, and the same inquest taxes the damages against the lessee; no attaint lies upon this verdict, because the judgment against the lessee is given upon the default; and so this is but an inquest of office for the damages.

Roll. Abr. 280.

An attaint lies upon a verdict before the sheriff in a writ of inquiry of waste, because by the statute the sheriff is made judge in this case.

Co. Litt. 355 a; Roll. Abr. 280.

No attaint lies upon a verdict given by twenty-four jurors, nor does it lie upon a verdict given in an attaint for the thing of which the jury is attainted; but, if they find any collateral matter *præter* the attaint, it lies thereupon, and they shall be attainted.

2 Roll. Abr. 280.

In a writ of (*a*) right, if the grand assize be taken upon the mere right, no attaint lies thereupon; but, if the issue be taken upon a collateral matter, and not upon the mere right, an attaint lies thereof.

12 H. 6, 6. (*a*) Whether an attaint lay in a plea real, because he might have falsified in an action of a higher nature, vide 2 Inst. 237.

If a deed with witnesses be pleaded, and the inquest pass in the affirmative, no attaint lies thereof, because the witnesses have adjudged this to be true. But otherwise it is, if it pass in the negative, and disaffirmance of the deed; (*b*) for the witnesses ought to testify nothing but what they see or hear.

Roll. Abr. 280; 23 Ass. 11; Br. *Attaint*, 67, *Testmoignes*, 12; 2 Inst. 662; Co. Lit. 6 b, S. P., because witnesses cannot testify a negative, but an affirmative. (*b*) An attaint does not lie for not finding a divorce, because that does not lie in their conusance, being a record. Roll. Abr. 281.—If the jury find a special matter which is not part of their charge, not pertinent to the issue, no attaint lies for this. 11 Co. 13.—Where it lies for finding falsely a matter of form only, the principal matter being true. Keilw. 67.

In an assize, if the jury find a special verdict, and refer it to the court whether upon the matter the tenant be a disseisor, and upon the matter the court adjudge him to be a disseisor; though in law he be no disseisor, yet no attaint lies against the jury, (*c*) because it is not their fault, but the fault of the court.

43 Ass. 41; Bro. *Attaint*, 82; Cro. Eliz. 309, S. P. *per Cur.*; 1 Ld. Raym. 470, S. C. cited. (*c*) But following the direction of the court barely will not bar an attaint; but in some cases the judge being demanded by and declaring to the jury what is the law, though he declares it erroneously, and they find accordingly, this may excuse them from the forfeitures; for though their verdict is false, yet it is not corrupt; but the judgment is to be reversed however upon the attaint: a man loses not his right by the judges mistaking the law. Vaugh. 145.

An attaint lies before execution sued, for the danger of the death of the petit jury in the mean time; for after the death of any of the petit jury, no attaint lies.

Roll. Abr. 282.

(M) For what Misdemeanors punishable.

An attaint lies for excessive damages, as also where the jury give too little. But if they give excessive damages, and the court abridge them,* and make them reasonable, no attaint lies against the jury, though they have made a false oath; for such abridgment is made upon the prayer of the party, and therefore he shall not have an attaint also.

9 H. 6, 2; Roll. Abr. 284. * *Qu.* If the Court hath any such power?

So, if the court increases† the damages, and makes them reasonable, whereas before they were too small, no attaint lies.

Roll. Abr. 284. † *Qu. ut supra;* unless in case of *mayhem*, on view, where consequences have ensued after the verdict, unforeseen, or not provided for in point of damages at the trial.

So, if the jury give excessive damages, and after the plaintiff, to whom they are given, release part of the damages, by which the rest of the damages which remain are reasonable enough, no attaint lies; for hereby the defendant's cause of grievance is taken away.

Roll. Abr. 284.

In an attaint, if the plaintiff assigns the false oath in excessive damages, he ought to assign it in this manner, *scilicet*, that the goods for which the damages were given were but of the value of 40*s.* and that in the damages given over this sum they made a false oath.

12 E. 4, 5, Bro. *Attaint.*

If in trespass against two one pleads not guilty, and this is found against him, and excessive damages given; and after the other defendant comes and pleads not guilty, and this is found against him also, he may have an attaint upon the first verdict, because bound by the damages given thereby; and though he is a stranger to the issue, yet he is privy in charge.

11 Co. 5 b; Sir John Heydon's case, Hob. 66; Cro. Ja. 351; 10 Co. 119; Roll. Rep. 31, S. P.

In a *quare impedit* against two, they make several titles, and it is found for one defendant, and that the other disturbed him, the other may have an attaint upon this, for by this he loses the presentation.

Roll. Abr. 282.

He who is party to the recovery shall have an attaint, although he was not tenant at the time of the first writ brought, nor when the judgment was given.

Roll. Abr. 282.—The reversioner (by the common law) after the death of tenant for life. Dyer, 1, pl. 5; 3 Co. 4.——And during the life of the particular tenant, per 9 Rich. 2, c. 3.

If an action of joint-tenancy be pleaded with a stranger, and the stranger join with the tenant in the maintenance thereof, and this be found against them; yet the stranger shall not have an attaint, because he is not party to the writ.

48 E. 3, 17; Godb. 378.

So, in an action against A and B, if it be found against them upon several issues, A shall not have an attaint upon a false verdict against B, because he is not party to the issue.

11 H. 4, 27; 1 Roll. Abr. 283.

So, in trespass against two, if one plead a release, upon which they are

at issue; and the other plead the same plea as servant to him; if it be found against the master, the servant shall not have an attaint thereupon, for he is not party to the issue.

11 H. 4, 30; 1 Roll. Abr. 283.

So, in waste against two, if one make default, and the other plead, and it be found against him; the other who made default shall not have an attaint thereupon, because he is not party to the issue.

Roll. Abr. 283.

If a villein be found free in a *homine replegiando* against the lord, and after the lord die, the heir shall have an attaint. So, if the villein were found free by a false verdict, in an action of trespass brought by him against the lord, and after the lord die, the heirs shall have an attaint, because hereby he loses his inheritance in the villein; but he cannot have an attaint for the damages; but the executors may, because they belong to them.

Roll. Abr. 283.

The petit jury can plead no plea but such as may excuse them of the false oath; and by the 23 H. 8, c. 3, it is enacted, that after the plaintiff hath assigned the false oath, the petit jury, if they be the same persons, and the writ, process, return, and assignment good, shall have no answer, but only that they made a true oath; unless the plaintiff in an attaint upon the same verdict, hath before nonsuit discontinued, or hath judgment against the petit jury.

11 H. 6, 6; Fitz. *Attaint*, 61, 65; Keilw. 130, same rule *arguendo*.

In an attaint upon a verdict in trespass, one of the petit jury pleaded an award between the plaintiff and the defendant, and whether this was a good plea *dubitatur*. Keilw. 130.

Vide 6 Co. 44 a, S. P., where it is said to be a good plea; yet *qu.* and vide Dyer, 75, pl. 27.

In an attaint brought by the issue in tail, upon a verdict in a *formedon* against his ancestor, the release of the ancestor is not any bar; for the attaint is entailed as well as the land itself.

Roll. Abr. 286; Co. Lit. 20 a, S. P.

By the 23 H. 8, c. 3, all attaints must be taken (*a*) in the King's Bench or Common Pleas, and not elsewhere; but a *nisi prius* may be granted.

(*a*) And therefore no conusance can be granted upon an attaint, because all attaints are to be taken either before the king in his bench, or before the justices of the Common Pleas, and in no other courts, &c. Co. Lit. 294 b; Jenk. 141.—Where a verdict and judgment given in the Exchequer were removed by *certiorari* into the Common Pleas, and an attaint, vide Dyer, 201, pl. 65; Moor, 17, pl, 60; N. Bendl. pl. 132; Keilw. 210, and vide Dyer, 81, pl. 65; Cro. Eliz. 645, in which book, because the record was not removed in *Bancum*, it was adjudged against the plaintiff, and the court would not grant him a day to bring in the record, and said, the plaintiff, at his peril, ought to have brought it in before; and vide Cro. Eliz. 371, 372.———How to be removed, vide Roll. Abr. 394.——But, if an attaint be brought on a judgment *in Banco*, and the plaintiff assign the false oath, and the defendants plead *bonum et legale fecerunt sacramentum*, and therefore they are at issue; and after the first record is removed into the King's Bench by writ of error; yet the process against the grand jury and the parties shall not be stayed, but the court may, it seems, proceed. Dyer, 284, pl. 35.

The judgment at common law was very (*b*) severe; and according to my Lord Coke importeth eight great and grievous punishments: 1. *Quod amittant liberam legem imperpetuum;* that is, they shall be so infamous as never to be received as witnesses, or to be of any jury. 2. *Quod forisfaciant omnia bona et catalla sua.* 3. *Quod terræ et tenementa in*

manus domini regis capiantur. 4. *Quod uxores et liberi extra domus suas ejiciantur.* 5. *Quod domus suæ prostrentur.* 6. *Quod arbores suæ extirpentur.* 7. *Quod prata sua arentur.* 8. *Quod corpora sua carceri mancipentur.*

Co. Lit. 294; Roll. Abr. 286. (*b*)And was so severe, that few or no juries upon just cause were convicted. 3 Inst. 163.

But the severity of this punishment was mitigated by the statute 23 H. 8, c. 3, which prescribes the methods of proceeding in attaint, and inflicts certain pecuniary punishments on the jurors, in proportion to the damages sustained by the party by the false verdict, in which the (*a*) party recovering is to be joined.

Vide Co. Lit. 294. ‖This act of 23 H. 8, c. 3, renewed the policy, and was raised on the platform of an act we have already had occasion to speak of, which was passed in 11 H. 7, but was suffered to expire in the second parliament of Henry 8. I cannot help noticing a strange mistake (as it would seem) of the law upon this subject in Lord Bacon's Life of Henry 7. In speaking of this act of 11 H. 7, the noble historian considers it as the *first* law which gave the attaint between party and party, whereas the proceeding by attaint, as we have already seen, existed from very early times, and the object of the legislature in the act alluded to, was to make it more expeditious and more effectual. Lord Bacon's words are: "This parliament was made that good law, which gave the attaint upon a false verdict between party and party, which before was a kind of evangile, irremediable." Or, as they are still stronger in the Latin: "*His etiam comitiis lata est tex illa bona, quæ breve de attineta vocatum* INTRODUXIT, *per quod judicia juratorum* (*quæ veredicta vocantur*) *falsa rescindi possint; quæ ante illud tempus evangelii cujusdam instar erant, atque planè irrevocabilia.*"‖ (*a*) And by the equity of the statute it lies against the executors of the party for whom judgment was given. Moor, 17, pl. 60; N. Bendl. 132; Keilw. 201 a; And. 24; Dyer, 201, l. 65.

If a man recover in an attaint, he shall be (*b*) restored to all that he hath lost by the verdict, as well his lands as the mesne profits; as also his damages, if he lost in a personal action.

Roll. Abr. 286. (*b*)If during the life of the tenant for life the reversioner recovers in an attaint, the tenant shall be restored to the possession and mesne profits, and the reversioner to his arrearages of rent. But, if the tenant be dead, or of covin with the demandant, the reversioner shall, &c., *per* 9 Rich. 2, c. 3.

So, if a man brings debt and is barred, and he brings an attaint, and it is found for him, he shall recover his debt.

Roll. Abr. 286.

So, if the issue in tail recovers the land in an attaint upon a recovery against his ancestor, he shall recover the issues of the land from the death of the ancestor.

41 Ass. 18; Roll. Abr. 286.

2. *How otherwise punishable.*

And herein we must consider jurors either in a ministerial capacity, as persons bound to attend the court, to do the business for which they are returned till they are discharged; or in a judicial capacity, as judges of the fact to be tried.

In the former capacity they are liable to be punished in several instances; as for (*c*) refusing to appear, withdrawing themselves before they are sworn, or refusing to be sworn; for which every court of record may, of common right, impose such a reasonable fine on any one returned on a grand or petit jury, as shall seem convenient.

8 Co. 38 b, 41 a; 2 Inst. 242; 2 Hal. Hist. P. C. 309. (*c*) By stat. 29 Geo. 2. c. 19, persons summoned on juries in courts of record, in cities, corporations, and franchises, and not attending, may be fined.

(M) For what Misdemeanors punishable.

‖ So, if they withdraw themselves after being challenged, and make default when summoned upon their triers finding them indifferent.

36 H. 6, 27, Fitzh. *Challenge*, 47.‖

So, if after they are sworn they refuse to give any verdict at all.

Noy, 49; 3 Bulst. 173; Vaugh. 152.

So, if they endeavour to impose upon the court; as, where a petit jury offer a verdict to the court as agreed by their whole number, where, in truth, some of them have not agreed to it; or where they agree upon two verdicts; and first, to offer one of them to the court, and stand to it, if the court shall express no dissatisfaction with it; but, if the court shall dislike it, then to give the other.

Roll. Abr. 219; Watts v. Brains, Sir T. Jon. 17; Vaugh. 153, S. C. cited. Cro. Eliz. 779; 2 Hawk. P. C. c. 22, § 17; 2 Hal. Hist. P. C. 309, S. P. and that in such case they shall be fined every one apart. Willes, 484.

So, for misbehaving themselves after their departure from the bar; as, where they do not all keep together till they have given their verdict; or where any of them carry any thing (*a*) eatable with them in their pockets; or eat or drink, or otherwise refresh themselves, without leave from the court, before they have given their verdict; though they were agreed on it, and were also all the time in the custody of the bailiff appointed to take care of them.

Dyer, 78, pl. 41, 218, pl. 4; Cro. Ja. 21; Vaugh. 21; 2 Hawk. P. C. c. 22, § 18; Tr. 14 H. 7, 27; Hil. 15 H. 7, 2. β The court refused to set aside a verdict on the ground that some of the jurymen went out of the room and returned in a few minutes. Clark v. Cole, 1 Penning. 278.*g* (*a*) Which, if it be at the charge of him for whom they give a verdict, avoids the verdict; otherwise, if they eat or drink at their own charge, or the charge of him against whom they give their verdict. 2 Hal. Hist. P. C. 306. β Misconduct of the jury is a cause of reversal of judgment. Demund v. Gowen, 2 South. 687.*g*

Also, where a jury, after they departed from the bar, being late on Saturday night, separated and went every one to his own house without giving a private verdict, or without consulting upon the evidence, and gave a verdict according to the direction of the court; for this misdemeanor they were fined each forty shillings, and a new trial granted. And herein the Chief Justice said, that by such trial both parties may be prejudiced; for the jurors going at large, without consulting together, may well forget the evidence; and it is the right of the king's subjects to have their issues determined when the evidence is fresh in the memory of the jurors; and the suffering the jurors to go to their houses after a privy verdict, is only by connivance, and by the strict rules of law ought not to be suffered.

Pasch. 27 Car. 2, in B. R.

βWhen the jury separate without authority, and this is followed by the slightest suspicion of abuse, their verdict cannot stand.

Oliver v. Springfield Presbyterian Church, 5 Cowen, 283. See Douglass v. Tousey, 2 Wend. 352; The People v. Douglass, 4 Cowen, 26. And the jury may be punished. Brown v. M'Connell, 1 Bibb, 265.*g*

Also, where the jury have been divided, or in doubt about the evidence, and have agreed to determine the matter by throwing cross or pile, &c., and to give their verdict as the chance happened; this has been held such a misdemeanor, for which they have been ordered to attend, and for which they are punishable, and for which a new trial (*b*) will be granted on the common rule of *juratores male se gesserunt*.

‖ R. v. Lord Fitzwalter, 2 Lev. 140; Freem. 414, S. C.; 3 Keb. 555, S. C.; Foster

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v. Hawden, 2 Lev. 205; Sir T. Jon. 83, S. C. by the name of Fry v. Hardy; 3 Keb. 805, S. C. by the name of Foy v. Harder; Phillips v. Fowler, Barnes, 441; Com. Rep. 525, S. C.; Andr. 383, S. C. cited; Parr v. Seames, Barnes, 438; Hale v. Cove, 1 Str. 642; Aylett v. Jewell, 2 Bl. Rep. 1299. β Where the jury cast lot for their verdict, it will be set aside. Mitchell v. Ehle, 10 Wend. 595. See Heath v. Conway, 1 Bibb, 398.g (b) Though evidence may be received with a view to punish the jurymen who have so misconducted themselves, yet for the purpose of obtaining a new trial in such case, the better policy of later resolutions has excluded the evidence of the jurors themselves, though almost the only evidence of which the case admits. Vaise v. Delaval, 1 T. R. 11; Owen v. Warburton, 1 N. R. 326; See also Prior v. Powers, 1 Keb. 811.‖

Jurors are likewise punishable for sending for or receiving instructions from either of the parties concerning the matter in question.

2 Hawk. P. C. c. 22, § 19. β When lodging at the defendant's house during the trial, will affect the verdict. Morris v. Vivian, 1 Mees. & W. 137; 2 Dowl. P. C. N. S. 235.g

β A juror charged with having declared before he was empannelled, that he had made up his mind against one of the parties, may be examined to show he did not make the declaration imputed to him.

M'Corkle v. Binns, 5 Binn. 340. See Cluggage v. Swan, 4 Binn. 150; Ritchie v. Holbrook, 7 S. & R. 458.

Jurors must be free from all exceptions and wholly disinterested.

Wood v. Stoddard, 2 Johns. 194.g

So, if a juryman have a piece of evidence in his pocket, and after the jury sworn and gone together he (a) show it to them, this is a misdemeanor fineable in the jury; but it avoids not the verdict, (b) though the case appear upon examination.

Cro. Eliz. 616; 2 Hal. Hist. P. C. 306. β If a juror know any fact in the cause, he should testify as a witness. Bacon v. Brown, 1 Bibb, 334.g (a) But it is no offence in a juror to exhort his companions to join with him in such verdict as he thinks right. 1 Hawk. P. C. c. 83, § 8. (b) The court would hardly let the verdict stand in this case.

As to the punishment of jurors in their judicial capacity, there are several instances where jurors acquitting great and notorious offenders, contrary to clear and manifest evidence, and contrary to the judge's directions, have been punished in the Star Chamber, and have also, not only in the King's Bench, but also by justices of *oyer* and *terminer* and jail delivery, been fined and imprisoned, and bound over to their good behaviour. But these methods were thought to be contrary to the opinions in the old books, and contrary to the general reason of the law; and being fully considered in (c) Bushel's case, it was there settled, and hath been ever since agreed to, that jurors are no way punishable, except by attaint, for giving a verdict contrary to the judge's direction, and against what may seem to others clear and manifest evidence; for that they are the proper judges of the fact to be tried, and may be reasonably influenced by matters known only to themselves, as their own personal knowledge of the fact, or of the credit of the witnesses, or of the parties.

2 Hawk. P. C. c. 22, § 20, and several authorities there cited. (c) Vaugh. 143; 2 Jon. 16, 17.

And herewith my Lord Hale seems to agree, and shows the unreasonableness of punishing a jury for going contrary to the direction of the court, in matters of law, because it is impossible any matter of law could come in question till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges. Also, says he, it were the most unhappy case that could be to the judge, if he, at his

peril, must take upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless.

2 Hal. Hist. P. C. 160, 161, 211, &c.

But he seems to admit,(a) that the long use of fining jurors in the King's Bench in criminal cases, may give possibly a jurisdiction to fine in these cases; yet that it can by no means be extended to other courts of sessions, of jail delivery, *oyer* and *terminer*, or of the peace, or other inferior jurisdictions.

2 Hal. Hist. P. C. 313. ‖ (a) Lord Hale does not seem to admit it. His words are, "although the long use of fining jurors in the King's Bench in criminal cases *may give possibly* a jurisdiction to fine," &c., yet it cannot be extended to other courts. This is no admission that the King's Bench has such power. Look back into the chapter of which this is the concluding paragraph. Lord Hale says, that such a practice had obtained in the King's Bench, and produces instances of it; but he nowhere approves it. His words are, "I do confess in the King's Bench there have been many precedents of jurors fined." But what does he confess? Not the law, but the practice. The very word "confess" shows that his private judgment was in opposition to the precedents.‖

Also, by Hawkins, if it shall plainly appear in any case, that jurors are perfectly satisfied of the truth of a fact, whereupon they declare to the court, that they find it in such a particular manner; and the court directly tell them, that upon the fact so found, as they have agreed it to be, the judgment of the law is such or such, and therefore that they ought to give a verdict accordingly, yet they obstinately insist upon a verdict contrary to such a direction; it seems agreeable to the general reason of the law, that the jurors are finable by the court in such a case, unless an attaint lies against them; for otherwise they would not be punishable for so palpable a partiality in taking upon them to judge of matters of law, which they have nothing to do with, and are presumed to be ignorant of, contrary to the express direction of one, who by the law is appointed to direct them in such matters, as is to be presumed of ability to do it.

2 Hawk. P. C. c. 22, § 21, for which is cited 2 Jon. 15, 16; Vaugh. 144, 145; Palm. 363; and vide Kel. 50.

Also, if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict, as they think fit, contrary to his direction; it seems questionable whether they may not be fined in such a case also, unless an attaint lie against them; for that it is the duty of jurors to take the advice and information of the court, in order to be governed by it, as far as shall be consistent with their consciences.

2 Hawk. P. C. c. 22, § 22. See Mr. Hargrave's excellent note upon the respective provinces of the judge and jury in his edition of Co. Lit. 155 b, n. (5), and the books there referred to. See also Erskine's speeches on the trial of the Dean of St. Asaph, and in support of the rights of juries. Erskine's Speeches, vol. i. 151, 264.

3. *How Abuses by others in relation to them are punishable; and therein of the Offence of Embracery.*

Embracery is defined in general to be an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favour one side by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial, whether the jurors give any verdict or not,(b) and whether the verdict be true or false.

Co. Lit. 369; Moore, 815; 1 Hawk. P. C. c. 85. ‖ The offence of *embracery* or

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management of the Dicasterion or judices, was not unknown at Athens, and at Rome it is called by Æschines παρασκευη, and those that were corruptly chosen, εκ παρασκευης καθεζομενοι, sitting as a jury by bargain. This Cicero, Verr. 1, calls *per pactionem*, or *per conditionem et pactum*. Whence, says Dr. Pettingal, we use the expression, a *pact jury, or jury by pact*. Inquiry into the Use, &c., of Juries among the Greeks and Romans, pages 33, 34, 124, 125. This is a very strained etymology, and would seem to be wholly groundless. The word "pack" is the past participle of the Anglo-Saxon verb pæcan, to deceive by false appearances; to counterfeit; to delude; to illude; to dissemble; to impose upon. Shakespeare, in Lear, has "packings of the dukes," upon which Mr. Stevens says, "*packings* are underhand contrivances." So, in Stanyhurst's Virgil, 1582. "With two gods *packing* one woman silly to cosen." Antony says of Cleopatra, "she has *packed* cards with Cæsar." So we say, "packing juries." See Mr. Horne Tooke's Diversions of Purley, vol. ii. 368. (*b*)Where a defendant against whom a criminal information had been granted, distributed handbills in the assize town, just before the trial was to come on, vindicating his own conduct, and reflecting on the prosecutor's; the judge at *nisi prius* upon this matter being disclosed to him by affidavit, put off the trial; and this affidavit being returned to the Court of King's Bench, that court granted another information against the defendant for the distribution of these papers; upon which information he was found guilty, and sentenced to six months' imprisonment in the King's Bench prison. R. v. Joliffe, 4 T. R. 485.‖

Also, it is an offence of this kind for a stranger barely to labour a juror to appear and act according to his conscience, or for any person to labour a juror not to appear. But this is no offence for the party himself, or for any person, who can justify an act of maintenance, to labour a juror to appear and give a verdict according to his conscience.

1 Hawk. P. C. *ubi supra;* Co. Lit. 157 b, 369 a; Jepps v. Tunbridge, Moore, 815; Hussey v. Cook, Hob. 294; Dy. 48 a, pl. 19; Noy, 102; Snell v. Timbrell, 1 Str. 643; Lord Coke seems to consider the words "according to his conscience" as qualifying the act. But this is a very slight distinction, and seems not warranted by the current of authorities, all of which, except the case in Dyer, are without this qualifying circumstance. Applications of this kind to a juror are to be watched with a very jealous eye. The rank of the applicant may give to them, however cautiously expressed, a commanding influence over the persons to whom they are addressed. Lord Herbert v. Shaw. 11 Mod. 111, 118; Wynne v. Bishop of Bangor, Com. Rep. 601.‖

Also, it is an offence to give money to a juror after the verdict, unless it be openly and fairly given to all alike, in consideration of the expenses of their journey and trouble of their attendance.

1 Hawk. P. C. *ubi supra.*

So, the bare giving of money to another, to be distributed among jurors, savours of embracery, whether any of it be distributed or not; and it is an offence of the like kind for a person by indirect means, to procure himself, or another, to be sworn of a *tales*, in order to serve one side: also, it is as criminal in a juror, as in any other person, to endeavour to prevail on his companions to give a verdict on one side, by any other arguments besides the evidence produced, and the general obligations of conscience.

1 Hawk. P. C. *ubi supra.*

The offence of embracery is punishable at (*a*) common law by indictment or action; and if it were not known before the trial, it will be a good cause to set aside the verdict.

1 Hawk. P. C. *ubi supra.* (*a*)How it is further restrained and punished by statute, vide 32 H. 8, c. 9; 2 Inst. 561; 5 E. 3, c. 10; 34 E. 3, c. 8; 38 E. 3, c. 12; 28 E. 1, st. 3, c. 10, and 1 Hawk. P. C. *ubi supra.*

Abuses by others in relation to juries, are punishable by fine and imprisonment; as, if a man assault or threaten a juror for having given a verdict against him, he may be indicted as a disturber of the administration of justice, and one who is guilty of a contempt to the king's courts.

1 Hawk. P. C. c. 21, § 14.

Also, the Court of King's Bench granted an information against a town-clerk, for publishing an order of the court against jurors who had found a person guilty of manslaughter only, upon an indictment of murder, by which order the said jurors were declared to be justly suspected of bribery.

Hil. 10 Ann., The Queen v. Wakefield.

3 An agent of one of the parties who had written a letter in the name of his principal to the sheriff, requesting him to summon the agent and two other persons whom he named, as jurors for the trial of the cause, was bound by the court to the sessions to answer.

Culbertson v. Martin, 2 Yeates, 443.

(N) Whether Jurors can impeach their Verdict.

JURORS cannot be admitted to testify in relation to the motives upon which they joined in the verdict.

Bridge v. Eggleston, 14 Mass. 245. See Brewster v. Thompson, 1 Coxe, 32; Den v. M'Alister, 2 Halst. 47; Clark v. Read, 2 South. 486; Taylor v. Geiger, Hardin, 586; Steele v. Logan, 3 Marsh. 396; Grundy v. Jackson, 1 Lit. 15; Randall v. Grover, Coxe, 151; Schenck v. Stevenson, 1 Penning. 387; Harrison v. Rowan, 4 Wash. C. C. R. 32; Dana v. Tucker, 4 Johns. 487; Forrester v. Guard, 1 Bre. 44; Browder v. Johnson, 1 Bre. 62; The State v. Freeman, 5 Conn. 348; People v. Meany, 4 Johns. 294; Straker v. Graham, 4 Mees. & W. 721, 7 Dowl. 223.

But jurors may prove that a mistake was made by the clerk in entering their verdict.

Jackson v. Dickenson, 15 Johns. 309.

A juror may prove improper attempts by a party to influence the minds of the jury.

Denn v. Driver, 1 Coxe, 166.

On a rule to show cause why the verdict should not be set aside on the ground of misbehaviour of the jury, the affidavits of jurors in their own exculpation are admissible evidence.

Kennedy v. Kennedy, 3 Harris, 450; Dana v. Tucker, 4 Johns. 487.*g*

See further tit. "TRIAL," and "VERDICT," *infra.*

JUSTICES OF PEACE.

|| JUSTICES of peace are judges of record appointed by the king under the great seal of England, to be justices within certain limits for the conservation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge.

Dalt. Just. 8. *β* In the several states of the American Union, justices of the peace are appointed or elected agreeably to the provisions of their respective constitutions. They have generally jurisdiction in civil cases to a limited extent. This is given by special laws. And in general they possess the powers of justices of the peace at common law.*g*

The constituting of justices of peace is inherent and inseparable from the crown; (*a*) and because this, among other prerogatives and authorities, had been severed therefrom, "to the great diminution and detriment of the royal estate of the same, and the hinderance and great delay of justice," as speaks the statute of 27 H. 8, c. 24, (*b*) it was

thereby enacted, that no person should have any power or authority to make any justices of peace, but only the king and his heirs. Nor was, nor is his power to be delegated; for that the king cannot grant a man power to make justices of the peace had been previously declared in the 20 H. 7, 7 a, in the case of the Liberty of St. Albans.(*c*)

Dalt. Just. 10. (*a*) This doctrine would seem to be the consequence of the king's being the fountain of justice; at the same time we are to remember that a great part of the ancient conservators of the peace was in the election of the people, and that it was not till the 1st of E. 3, that the appointment of them was translated to the crown; and that these conservators of the peace were the same officers, who were afterwards called, in the 18th of E. 3, justices of the peace. (*b*) It is provided by this act, § 5, that the commission for the county palatine of Lancaster may be still under the king's usual seal of Lancaster.‖ *β*(*c*) See Jones v. Williams, 3 Barn. & Cress. 762.*g*

(A) Of the ancient Officers called Conservators of the Peace.

(B) Of the first Institution and general Statutes, which give Justices of Peace a Jurisdiction.

(C) Of their Commission, and Manner of appointing them.

(D) Who are qualified for the Office.

(E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them: and herein,

1. *What Jurisdiction they have in relation to Treason and Misprision of Treason.*
2. *What in relation to Felonies.*
3. *What in relation to inferior Offences.*
4. *How far they have Power to proceed on Indictments not taken before themselves.*
5. *By what Justice the Jurisdiction must be exercised; and therein how far a Justice of a County may act out of it, or within a Liberty.*

[(F) Their Indemnity and Protection by the Law in the right Execution of their Office; and their Punishment for the Omission of it.]

(A) Of the ancient Officers, called Conservators of the Peace.

It seems to be clearly agreed, that before the statute 1 E. 3, c. 16, there were no justices of the peace, and that they were first instituted by that statute; yet by the common law there were certain conservators of the peace, who were of two sorts: 1. Those who in respect of their offices had power to keep the peace, but were not simply called by the name of conservators of the peace, but by the name of such offices. 2. Those who were constituted for this purpose only, and were simply called by the name of conservators or wardens of the peace.

Lamb. book 1, c. 3; 2 Hal. Hist. P. C. 44; 2 Hawk. P. C. c. 8.

As to the first sort, the king is undoubtedly the principal from whom all authority of this kind is originally derived. But it is said, that he cannot take a recognisance for the peace, because it is a rule that no recognisance can be taken by any one who is not a justice either of record or by commission. Also the lord chancellor, or lord keeper of the great seal, the lord high steward of England, the lord marshal, the lord high constable, and every justice of the King's Bench, and the master of the Rolls, and, as some say, the lord treasurer, have a general authority to keep the peace throughout the realm, and to award process, and to take recognisances for it. But a peer, as such, seems to have no more power in this respect than a mere private person.

Dalt. chap. 1; Crompt. 6; Bro. *Recognisance*, 14. [But neither privy-counsellors nor secretaries of state are, as such, conservators of the peace. 11 St. Tr. 320.]

(B) Of the Institution and Jurisdiction of Justices.

Also, all courts of record, as such, have power to keep the peace within their own precincts; and the justices of jail-delivery may take surety of the peace from a person committed, for not finding such surety.

10 H. 6, 7 b, Lamb. book 1, chap. 3.

Also, every sheriff is a principal conservator of the peace within his county, and may *ex officio* award process, and take surety for it; and, as some say, the surety so taken is to be looked on as a recognisance or matter of record, and not as a common obligation, because it is taken by virtue of the king's commission.

10 H. 7, 17 b, Bro. *Peace*, 13; Cro. Car. 26; F. N. B. 81.

Also, a coroner is another principal conservator of the peace, and may bind any one to the peace who shall make an affray in his presence; but he is said to have no authority to grant process for the peace; and it seems, that the security taken by him for the peace is not to be looked on as matter of record, but as matter *in pais*, only except where it is taken by him as judge in his own court for an affray in his presence.

Vide tit. *Coroner*.

Also, every high and petit constable are, by the common law, conservators of the peace within their several limits, and may take order for the keeping of the same.

Vide tit. *Constable*.

The conservators of the peace, simply so called, were either ordinary or extraordinary.

The ordinary were either by tenure, viz., such as held their lands by this service; or by election, viz., such as were chosen by the freeholders of a county, in pursuance of the king's writ for this purpose; or by prescription, viz., such as claimed such a power by an immemorial usage in themselves and their ancestors, or predecessors, or those whose estate they had. But the power of none of those conservators of the peace seems to have been greater than that of constables at this day, unless it were enlarged by some special grant or prescription.

Bro. *Peace*, 18, *Prescript*, 79; 22 E. 4, 35 b, Lamb. book 1, chap. 3; Co. Lit. 114; Doct. & Stud. book 1, ch. 7; Crompt. 6; Lamb. book 1, chap. 3.

The extraordinary conservators of the peace were persons specially commissioned in times of imminent danger, either from rebels or foreign invaders, to take care of and defend such a particular district committed to their charge, and to preserve the peace within the limits of it; and these had power to command the sheriff, with his whole *posse*, to assist them.

(B) Of the first Institution, and general Statutes which give Justices of the Peace a Jurisdiction.

Justices of the peace were (*a*) first instituted by the statute of 1 E. 3, c. 16, which provides in the following words: "That for the better keeping and maintenance of the peace, the king willeth, that in every county good men and lawful, which be no maintainers of evil, or barrators in the country, be assigned to keep the peace."

(*a*) And therefore a person cannot be a justice of peace by prescription. 4 Leon. 149.——They have no jurisdiction but what statutes give them, being created within time of memory. Salk. 406, pl. 2.

‖ By this act a great alteration was effected in the constitution of the country; for it took away from the people the election of the conservators

of the peace, and placed it in the assignment of the crown. But having made this change in the source of the authority, which might seem called for by the disturbed state of the kingdom at the time, it went no further; it neither gave any new powers, nor extended the limits of the former authority; these officers were still called, and were in fact no more than, conservators of the peace, nominated by the crown, as auxiliary to those who were such by the titles mentioned in the preceding chapter. In a very short time, however, they were invested with the power of taking indictment; || for by 4 E. 3, c. 2, "There shall be assigned good and lawful men in every county to keep the peace; and at the time of the assignments mention shall be made that such as shall be indicted or taken by the said keepers of the peace, shall not be let to mainprize by the sheriffs, nor by none other, if they be not mainpernable by the law; nor that such as shall be indicted shall not be delivered but at the common law. And the justices assigned to deliver the jails shall have power to deliver the same jails of those that shall be indicted before the keepers of the peace, and the said keepers shall send their indictments before the justices; and the said justices shall have power to inquire of sheriffs, jailers, and others, in whose ward such indicted persons shall be, if they make deliverance or let to mainprize any so indicted, who are not mainpernable, and to punish the said sheriffs, jailers, and others, if they do any thing contrary to this act."

|| Mr. Reeves in referring to this act, says that such *keepers* shall have power, &c.; but upon what authority I know not: the original act, as printed, having the words "eient les ditz justices."||

No alteration was made in their authority till the 18 E. 3, when they were empowered to *hear and determine*. By a statute of that year, c. 2, it is enacted, "That two or three of the best reputation in the counties shall be assigned (*a*) keepers of the peace by the king's commission, and at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to the manner of the deed."

(*a*) Although they are not named keepers, but justices of peace in their commission, yet inasmuch as by this statute they are expressly called keepers of the peace, and the keeping thereof is the principal end of their office, it has been adjudged, that the caption of an indictment *coram A B et C D custodibus pacis et justiciariis domini regis* is good, without expressly naming them justices of peace. 2 Roll. Abr. 95; Reg. v. Bonnet, 11 Mod. 141.—Also, it has been resolved, that the description of justices of peace by the name of *justiciarii domini regis ad pacem conservandam*, &c., is good, without saying *ad pacem domini regis*, for that is necessarily implied. 2 Hawk. P. C. c. 8, § 32.

|| The authority to hear and determine given by this statute was only occasional, and jointly with others; it was not till the 34th year of this king, that the general standing authority for that purpose was given to them; so that it was, probably, not till then that they were commonly reputed and called Justices, as they are by st. 36 E. 3, Lamb. 23.||

By 34 E. 3, c. 1, it is enacted, "That in every county of England shall be assigned, for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the law; and they shall have power to restrain offenders, rioters, and all other barrators, and to pursue, arrest, take and chastise them according to their trespass or offence, and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do, by their discretion and good advisement; and also to

inform themselves, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now returned, and go wandering, and will not labour as they were wont in times past; and to take and arrest all those that they may find by indictment or by suspicion, and to put them in prison, and to take of all them that be not of good fame, where they shall be found, sufficient surety (*a*) and mainprize of their good behaviour towards the king and his people, and to duly punish others, to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor others passing by the highway of the realm disturbed, nor put in the peril which may happen of such offenders; and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid."

‖ (*a*) This was the first authority these officers had to take *sureties for good behaviour*, and indeed the first mention of it in any statute or law-book.‖

‖By c. 5, of the same statute, those who were assigned to keep the peace were empowered to inquire of measures and weights according to the statute of 25 E. 3, st. 5, c. 9.

By st. 36 E. 3, & st. 1, c. 12, it is enacted, "That in the commissions of justices of the peace (for so they were now called) and of labourers express mention be made, that the same justices hold their sessions four times in the year, that is to say, one session in the octave of the Epiphany, the second within the second week in Lent; the third between the feasts of Pentecost and St. John the Baptist; the fourth within eight days of St. Michael."

Rot. Parl. vol. ii. 271, No. 20.

‖By 12 R. 2, c. 10, "In every commission of the justices of peace there shall be assigned but six justices, with the justices of assize, and the said six justices shall keep their sessions in every quarter of the year at the least, and by three days, if need be, upon pain to be punished according to the discretion of the king's council at the suit of any man that will complain." "And it is not the intent of this statute that the justices of the one bench or of the other, nor the serjeants at law, in case that they shall be named in the said commissions, shall be bound by force of this statute to hold the said sessions four times in the year, as the other commissioners who are continually abiding in the country, but that they do it when they can best attend to it."

And by this statute "every of the said justices shall take for their wages four shillings the day for the time of their said sessions, and their clerk two shillings of the fines and amercements arising and coming of the same sessions by the hands of the sheriff."

By 13 R. 2, c. 7, "Whereas it is contained in the last statute made at Cambridge (12 R. 2, c. 10,) that no steward of any lord shall be assigned in the commission of justice of the peace, nevertheless for certain causes showed in this parliament, it is accorded and assented, that justices of the peace be made of new in all the counties of England, of the most sufficient knights, esquires, and gentlemen of the law of the said counties, notwithstanding the said statute; and that the said justices be sworn duly and without favour to keep and put in execution all the statutes and ordinances touching their offices."

By 14 R. 2, c. 11, it is enacted, "That in every county be assigned eight justices of the peace, as is contained in the statute of Cambridge,

(12 R. 2, c. 10,) besides the lords assigned in this parliament; and that the estreats of the said justices be doubled, and the one part delivered by the said justices to the sheriff to levy the money thereof rising, and thereof to pay the justices and their clerks their wages by the hand of the said sheriff by indenture betwixt them thereof to be made; and that the sheriffs have allowance in their account in the exchequer by the same indenture. And that no duke, earl, baron, or baronet, albeit they be assigned justices of the peace, and hold their sessions with the other eight justices, shall take any wages for the said office. And that the justices who hold their sessions put their names and the names of their clerks in the same estreats, together with the number of the days of their sessions, to the intent that the sheriffs may know to whom to pay the wages, and to whom not; and the barons of the exchequer to whom to allow, and to whom not."

By 17 R. 2, c. 10, reciting, "Forasmuch as thieves notoriously defamed, and others taken with the manner, by long abiding in prison after they are arrested, are delivered by charters and favourable instruments, procured to the great hinderance of the people, it is accorded and assented, that in every commission of the peace through the realm, where need shall be, two men of law of the same county where such commission shall be made, shall be assigned to go and proceed to the deliverance of thieves and felons, as often as they shall think it expedient."

By 2 H. 5, st. 1, c. 4, § 2, it is enacted, "That the justices of peace in every shire named of the *quorum* be resiant within the same shire, (except lords named in the commission, and also except the justices of the one bench, and of the other, the chief baron of the Exchequer, serjeants at law, and the king's attorney, for the time that the same justices, chief baron, serjeants at law, and king's attorney are attending and occupied in the king's court, or elsewhere occupied in the king's service,) and make their sessions four times by the year, (that is to say,) in the first week after the feast of St. Michael, and the first week after the feast of the Epiphany, and in the first week after the close of Easter, and in the first week after the translation of St. Thomas the Martyr, and more often, if need be. And that the same justices hold their sessions throughout England in the same weeks every year henceforth."

By 54 G. 3, c. 84, the quarter sessions for the Michaelmas quarter shall in every year be holden for every county, riding, division, city, borough, and place within England and Wales, and for Berwick-upon-Tweed, in the first week after the eleventh day of October in every year, instead of the time before appointed for holding the same; but this not to alter the time of holding the sessions for London or Middlesex.‖

These seem to be the most general statutes relating to the authority of justices of peace, besides which there are a very great number of subsequent statutes which give them particular powers, sometimes to one justice, sometimes to two, sometimes in their sessions, sometimes out of their sessions; of which in this place I shall no otherwise take notice than by observing, that where by statute a special authority is given to justices of peace, it must be exactly pursued.

See Mr. Chetwynd's highly improved edition of Burn's Justice; 2 Salk. 475, pl. 14; 5 Burr. 2686.

(C) Of their Commission, and Manner of appointing them.

JUSTICES of the peace can only be appointed by the king's commission,

and such commission must be in his name. But it is not requisite that there should be a special suit or application to, or warrant from, the king for the granting thereof, which is only requisite for such as are of a particular nature; as constituting the mayor of such a town, and his successors, perpetual justices of the peace within their liberties, &c., which commissions are (*a*) neither revokable by the king, nor determinable by his death, as the common commission for the peace is, which is made of course by the Lord Chancellor according to his discretion.(*b*)

Lamb. book 1, c. 5; Brooke, *Commission*, c. 5; Dalt. c. 3; Lev. 219. [Justices of the peace may likewise be by act of parliament; as the Bishop of Ely and his temporal steward, the Bishop of Durham and his temporal chancellor, and the Archbishop of York and his temporal chancellor of the liberty of Hexam, by stat. 27 H. 8, c. 23, § 20, 21, 22.] (*a*) Nor can a justice of peace of a corporation, created by patent, resign. Roll. Rep. 135. ‖ (*b*) In the exercise of his discretion in this respect, the chancellor, in modern practice, is guided by the *custos rotulorum* of the country, whose high rank and extensive local connections seem to point him out as well qualified to advise the crown in so important an appointment. It is with him, in fact, that the whole of his duty now rests. *He* determines when a new commission is necessary: *he* makes the application for it: and *he* nominates the commissioners; for the list of names proper to be inserted, which he annexes to his application to the Great Seal, is in general, I believe, always, implicitly received. It is not then to be wondered that the commission is occasionally tinctured with the sentiments and peculiar notions of this officer; and that a description of men freely admitted in one county is wholly excluded in another. It is well known that in the commissions of the peace for two counties the name of a clergyman is not to be found, while the clergy form so large a proportion of the magistrates in most others. There is nothing in the state of either of those counties which makes it more dangerous to intrust that order of men with temporal jurisdiction in it, or which more especially requires they should be confined solely to the performance of their pastoral duties. It is the policy of the *custos rotulorum* to exclude them; and to that policy the Great Seal defers.‖

The form of the commission of the peace, as it is at this day, was, according to Hawkins, settled by the judges about the 33 Eliz., and is in substance as followeth.

2 Hawk. P. C. c. 8, § 2; 4 Inst. 171; Lamb. b. 1, c. 9.

Beginning with a salutation from the king to the several persons named in it, it afterwards assigns them, and every one of them jointly and severally, the king's justices to keep the peace in such a county, and to cause to be kept all statutes made for the good of the peace and quiet government of the people, as well within liberties as without, and to punish all those who shall offend against any of the said statutes, and to cause all those to come before them, or some of them, who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behaviour;(*c*) and if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it.

2 Hawk. P. C. c. 8, § 23. ‖ (*c*) Upon the statute of 34 E. 3, c. 1, according to Mr. Crompton, is grounded the power of justices to bind to the good behaviour; a power which Lord Hale says, though expressed generally and without any limitation, is not intended to be perpetual, but in nature of bail, viz., to appear at such a day at their sessions, and in the mean time to be of good behaviour. 2 Hawk. P. C. 136. But it has been lately holden by the Court of K. B. that a justice of the peace is authorized to require surety of the peace for a limited time (*e. g.* two years) according to his discretion, and that he need not bind the party over to the next sessions only. Willes v. Bridger, 2 B. & A. 278. The power of the justices, said Lord C. J. Abbot, in giving judgment in this case, is derived from their commission; and is founded in the first clause, or *assignavimus* of the commission; and by that clause the power is given to any one justice, and not to two or more, as is done by the second clause, which relates to the taking and trial of indictments, and some other matters; and there-

fore, if a single judge cannot take security for a longer period than until the next sessions, it will be difficult to show that a number of justices, assembled at sessions, can take it for a longer time; and unless they can do so, then, as it may be in most cases expedient that the period of surety should be longer than the interval between sessions and sessions, both parties, or, at least, the party required to give the surety, and his mainpernors, must be harassed by repeated attendances to accomplish an object which may be as well effected by a single attendance, at which the whole matter may be heard and discussed.‖

Then it goes on, and assigns them, and every two or more of them, (of which number either such or such a particular person among them is specially required to be justices,) to inquire by the oath of good and lawful men of the same county, of all felonies, witchcrafts, enchantments, sorceries, magic art, trespasses, forestallers, regrators, engrossors, and extortions whatsoever, and of all other offences of which justices of the peace may lawfully inquire; also, of all those who shall go or ride armed, &c., or in companies, to the disturbance of the peace, and also of all inn-holders, and others, who shall offend in the abuse of weights and measures, or selling of victuals, &c., and also of all sheriffs, bailiffs, stewards, constables, jailers, and other officers, who shall be faulty in the execution of their offices; and to inspect all indictments taken before them, or any of them, or other former justices of the peace for the same county, and to make and continue process against all the persons so indicted, till they shall be taken, or render themselves, or be outlawed, and to hear and determine all the felonies and other offences aforesaid; provided, that if a cause of difficulty shall arise, they shall not proceed to give judgment, except in the presence of some justice of one of the benches, or of assize.

2 Hawk. P. C. c. 8, § 23.

And it then commands them to make inquiries of the premises, and to hear and determine the same, at certain days and places, which they, or any such two or more of them, shall appoint; and then it goes on, and commands the sheriff of the county to return before them, at certain days and places to be made known to him by them, such and so many lawful men of his bailiwick, by whom the truth of the premises may be best known and inquired; and then concludes, by assigning some one of them keeper of the rolls of the peace in the same county, and commanding him to cause to be brought before himself and his fellows, at the said days and places, the writs, precepts, processes, and indictments aforesaid.

2 Hawk. P. C. c. 8, § 25.

My Lord Hale gives us the same commission, which at present, says he, consists of two clauses of *assignavimus;* by the first of which each of them is made a justice or conservator of the peace; by the second *assignavimus*, power is given to them, or two of them, whereof one of the quorum, to hear and determine felonies, and other matters; for the bare making them justices of the peace, without this clause, doth not give them power to hear and determine indictments. He also takes notice of a proviso in the said commission, viz., that in case of difficulty arising, then to respite judgment till the justices of assize come into the county, &c.

2 Hal. Hist. P. C. 43; Stamf. P. C. B. 2, c. 5.

It seems agreed that justices of the peace may, by virtue of their commission, execute as well the statutes made before the reign of Edw. 3, for the better keeping of the peace, such as the statutes of Winchester and Westminster, &c., as those made since that time; and yet the statutes which ordain justices of the peace, say nothing of the execution of those former

(D) Who are qualified for the Office.

statutes; from whence, says Hawkins, it appears that the king may, by commission, authorize whom he pleases to execute a statute.

Lamb. b. 1, c. 9; Dalt. c. 5; Crompt. 7, 8. β The commission of a justice of the peace is conclusive evidence of his appointment. Talbot v. Simpson, 1 Pet. C. C. R. 188. See Cornish v. Young, 1 Ashm. 153; *g* 2 Hawk. P. C. c. 8, § 28.

‖ By 5 W. & M. c. 4, the crown may by commission under the great seal of England constitute such number of justices of the peace in the counties in Wales, as it shall think fitting and convenient, in the same manner as it does in England; and the persons so constituted shall have as full power to execute the office of justice of the peace as any other justice might have done before the passing of the act. The king's power in this respect had been limited to eight justices in each county, by 34 & 35 H. 8, c. 26, § 55, which clause this act repealed.‖

β In making up and completing his records, a justice of the peace acts ministerially and not judicially, consequently he may do it when not in commission.

Matthews v. Houghton, 2 Fairf. 377. *g*

(D) Who are qualified for the Office.

By the statute 2 H. 5, st. 2, c. 1, it is enacted, "That justices of peace shall be made in the counties of England of most sufficient persons dwelling in the same counties, by the advice of the chancellor and of the king's council, without taking other persons dwelling in foreign counties to execute such office, except the lords and the justices of assizes to be named by the king and his council, and except all the king's chief stewards of the lands and seignories of the duchy of Lancaster in the north parts and in the south for the time being."

‖ By 1 E. 6, c. 7, § 4, it is enacted, "That albeit any person or persons being justice of assize, justice of jail-delivery, or justice of peace, within any of the king's dominions, or being in any other of the king's commissions whatsoever, shall fortune to be made or created duke, archbishop, marquess, earl, viscount, baron, bishop, knight, justice of the one bench or of the other, serjeant at law or sheriff, yet that notwithstanding, he and they shall remain justice and commissioner, and have full power and authority to execute the same, in like manner and form as he or they might or ought to have done before the same." But by 1 Mar. sess. 2, c. 8, reciting the above clause in the 1 E. 6, c. 7, and that sithence the making of that act divers persons being in commission of the peace in one county had been made sheriffs of the same county, and had exercised either of the said offices, which seemeth not to be convenient; wherefore it is enacted, "That no manner of person or persons having, using, or exercising the office of the sheriff of any county or counties, shall use or exercise the office of the justice of the peace, by force of any commission, or otherwise, in any county or counties where he or they shall be sheriff, during the time only that he or they shall use or exercise the said office of sheriffwick, any thing in the said former act to the contrary in any wise notwithstanding. And that all and every act or acts to be done by such sheriff and sheriffs by authority of any commission of the peace, during the time above-said, shall be void and of none effect."

[Also, if he be made a *coroner*, this, by some opinions, is a discharge of his authority of justice.

Dalt. c. 3.

(D) Who are qualified for the Office.

By 5 Geo. 2, c. 18, § 2, no attorney, solicitor, or proctor, shall be a justice of the peace during the time he shall continue in the practice of that business.]

By the statute 18 H. 6, c. 11, it is enacted, "That no justice of peace within the realm of England, in any county, shall be assigned or deputed, if he have not lands or tenements to the value of 20*l.* *per annum*, except in cities, towns corporate, &c.

In an indictment on this statute, it must be shown that he had a commission, and did some act pursuant thereto, not having lands, &c. Cro. Ja. 643, 644.

And now by the 18 G. 2, c. 20, it is enacted, "That no person shall be capable of being a justice of the peace, or to act as a justice of the peace, for any county within that part of Great Britain called England, or the principality of Wales, who shall not have an estate of freehold or copyhold, to and for his own use and benefit, in possession for life, or for some greater estate, either in law or equity, or an estate for years determinable upon one or more life or lives, or for a certain term, originally created for twenty-one years or more, in lands, tenements, or hereditaments, lying in that part of Great Britain called England, or principality of Wales, of the clear yearly value of one hundred pounds, over and above what will satisfy and discharge all encumbrances that may affect the same, [and over and above all rents and charges payable out of, or in respect of the same, and who shall not be seised of, or entitled unto in law or equity, to and for his own use and benefit, the immediate reversion and remainder of and in lands, tenements, or hereditaments, lying or being as aforesaid, which are leased for one, two, or three lives, or for any term of years determinable upon the death of one, two, or three lives, upon reserved rents, and which are of the clear yearly value of three hundred pounds; and who shall not, before he takes upon himself to act, at some general or quarter sessions for the county, riding, or division for which he does or shall intend to act, first take and subscribe the oath" of his having such qualifications above required.

The oath so taken and subscribed shall be kept by the clerk of the peace among the records of the sessions.

And the clerk of the peace shall on demand forthwith deliver an attested copy to any person paying 2*s.* for the same; which being proved to be a true copy of such oath, shall be admitted in evidence on any issue in an action brought on this act.

And if any person shall act as justice, without having taken and subscribed the said oath, or without being qualified as above, he shall for every offence forfeit 100*l.*, half to the poor of the parish wherein he most usually resides, and half to him who shall sue, with full costs. The prosecution to be in six months.

And in such action, the proof of the qualification shall lie on such person against whom it is brought.

And if the defendant intends to insist upon any lands not contained in such oath, he shall at or before the time of pleading deliver to the plaintiff or his attorney a notice in writing specifying such lands, and the parish and county where they are situate (offices and benefices excepted, which it shall be sufficient to ascertain by their usual names:) And if the plaintiff in such suit shall think fit thereon not to proceed further, he may with leave of the court discontinue his suit on payment of costs to the defendant as the court shall award.

Upon the trial, no estate, but what is contained in the oath and notice, shall be admitted as any part of the qualification.

Provided, that where the qualification or any part thereof consists of rent, it shall be sufficient to specify in such oath or notice so much of the lands, out of which such rent is issuing, as shall be of sufficient value to answer the rent.

And if the plaintiff or informer shall discontinue (otherwise than as aforesaid) or be nonsuit, or judgment be given against him, he shall pay treble costs.

But this shall not extend to any city, town, or liberty, having justices of their own; nor to any peer, lord of the privy council, judge, attorney, or solicitor general, or to the justices of the great sessions of Cheshire and Wales, or to the eldest son or heir apparent of a peer, or of any person qualified to serve as a knight of the shire; nor to the officers of the board of green cloth, or principal officers of the navy, or the two under-secretaries in each of the offices of the principal secretary of state, or to the secretary of Chelsea College, in their respective liberties; or to the heads of colleges or halls, or vice-chancellor of either of the universities, or to the mayor of Oxford or Cambridge.

|| On renewing the commission of the peace (which generally (*a*) happens as any person is newly brought into the same) there cometh a writ of *dedimus potestatem* directed out of Chancery to some ancient justice or other to take the oath of him which is newly inserted, which is usually in a schedule annexed, and to certify the same into that court, at such a day as the writ commands. This oath seems to be founded on the statute of 13 R. 2, c. 7, *supra*, which requires the justices to be sworn duly, and without favour to be put in execution the statutes and ordinances touching their offices.

(*a*) Not always; for sometimes new magistrates are added under the cold seal; as it is termed; that is, their names are endorsed on the old commission, and the seal is *pro formâ*, applied again to the same wax.

Besides this oath, which is called the oath of office, the justices are required to take the oath of qualification under the 11 G. 2, and also the oaths of allegiance and supremacy and abjuration, and to subscribe the declaration against transubstantiation.

By 1 G. 3, c. 13, § 2, no person who has once taken the oaths under a writ of *dedimus potestatem*, shall be obliged, upon the issuing of a new commission, to sue out or have any other *dedimus potestatem* from the clerk of the crown; but the clerk of the peace or his deputy shall, on every new commision being issued, prepare a parchment roll, with the oaths annexed to and usually taken under the writ of *dedimus potestatem* engrossed on such roll, and shall administer without fee to such justices the oaths in such roll specified: which justices, having taken the said oaths, shall subscribe their names on the said parchment roll, and the said roll shall be kept among the records of the sessions. And by 7 G. 3, c. 9, no persons who have been or shall be appointed justices by any commission granted by his present majesty, and have taken and subscribed or shall take and subscribe the oaths mentioned in the said act of 1 G. 3, (viz. the oath of office, and of being duly qualified as required by 18 G. 2, *supra*,) and no persons who shall be appointed justices by any commission which shall be granted after his majesty's demise by any of his successors, and shall have, after issuing the first commission whereby they shall be appointed justices in the reign of any succeeding king, taken and subscribed the said oaths, shall be obliged during the present or any future reign, in which such oaths shall have been so taken and subscribed as aforesaid, to take and subscribe

the same oaths, for or by reason of such persons being again appointed justices of the peace by any subsequent commission or commissions which shall be granted during any such reign.‖

Although a man be a *mayor*, yet it doth not follow that he is a justice of the peace, for that must be by particular grant in the charter. *Per* Holt, C. J. But although he be not a justice of the peace by the charter, yet there are many cases, saith Dr. Burn, wherein he hath the same power as a justice of the peace given unto him by particular statutes; as, for instance, with regard to the customs, ale-houses, Lord's-day, swearing, gaming, weights, servants, fuel, leather, orchards, soldiers, and divers others.]

2 Ld. Raym. 1030; 3 Inst. 12. ‖ The lord mayor of London, *virtute officii*, before any acts of parliament for justices of the peace, was a conservator of the peace, and thereof the court will take notice; and also upon account of the statute 8 H. 6, c. 26, which makes all mayors justices of the peace. 11 Mod. 47, *arguendo*.‖

β It is *prima facie* evidence that a person who acts as a justice of the peace, although he did not style himself as such, had lawful authority.

Briden v. Taylor, 2 Har. & Johns. 396. See Siler v. Ward, 1 Car. Law Rep. 548. And the initials J. P. sufficiently designate his official capacity. State v. Manly, 1 Tenn. 429.

As long as the commission of a justice is in force, he is to be deemed to have acted officially, although he does not subscribe himself as a justice.

Commissioners of Berks v. Ross, 3 Binn. 539.*g*

‖ The acts of a justice who has not duly qualified by delivering in a certificate pursuant to 51 G. 3, c. 36, are not absolutely void, and therefore persons seizing goods under a warrant of distress signed by him are not trespassers.

Margate Pier Company v. Hannam, 3 Barn. & A. 266.‖

(E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them; And herein,

1. *What Jurisdiction they have in relation to Treason and Misprision of Treason.*

It seems to be clearly agreed, that justices of the peace have not jurisdiction to (*a*) hear and determine treason, *præmunire*, or misprision of treason.

Dalt. c. 90; H. H. P. C. 305, 350, 372; 2 H. H. P. C. 44; 2 Hawk. P. C. c. 8, § 34. βIn Massachusetts, a recognisance taken by a justice of the peace, conditioned for the appearance of one charged with homicide, is void. Commonwealth v. Loveridge, 11 Mass. 387.*g* (*a*) In H. H. P. C. 372, it is laid down as the opinion of Chief Justice Roll, that justices of the peace may take an indictment of treason, though they cannot determine it.—But in another place, viz. H. H. P. C. 305, my Lord Hale says expressly, that they cannot take an indictment of it.

But as these offences are against the peace of the king and of the realm, any justice of the peace may, either upon his own knowledge or the complaint of others, cause any person to be apprehended for any such offence, and such justice may take the examination of the person so apprehended, and the (*b*) information of all those who can give material evidence against him, and put the same in writing, and also bind over such as are able to give any such evidence to the King's Bench or jail-delivery, and certify his proceedings to the same court to which he shall bind over such informers. And this doctrine seems to be established by constant practice, especially since the statutes of 1 & 2 P. & M. c. 13, and 3 P. & M. c. 10, which, directing justices of peace to proceed in this manner against persons brought

before them for felony, seem to give them a discretionary power of proceeding in like manner against persons accused of the above-mentioned offences.

Vide the authorities *supra*. (*b*) And these informations taken upon oath, as they ought to be, and sworn to by the justice, or his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be dead, or not able to travel, and sworn so to be. Also, says my Lord Hale, by the opinion of some, if he were bound over, and appear not, they may be read; but this, he says, is questionable. 2 H. H. P. C. 305. But for this vide 2 Hawk. P. C. 46.

Also, by some acts of parliament, justices of peace may take indictments of particular treasons; but those presentments they must certify into the King's Bench or jail-delivery, as the case shall require; as upon the statute of 5 Eliz. c. 2, for maintaining the authority of the see of Rome; 13 Eliz. c. 2, for bringing in bulls for absolution, *Agnus Dei*, &c., 23 Eliz. c. 1, for withdrawing and reconciling, or being withdrawn from the king's allegiance.

2 H. H. P. C. 44; Leon. 239.

So, by the statute of 3 H. 5, c. 7, as to treason for clipping, &c., power was given to the justices of peace to inquire and make process thereupon, and anciently that clause was put into their commission, but now omitted; for by the stat. of 1 Mar. c. 1, the act of 3 H. 5, c. 6, is repealed, and consequently the acts of 3 H. 5, c. 7, that gave power to justices of peace to inquire touching it.

2 H. H. P. C. 45.

2. *What in relation to Felonies.*

It seems to have been a matter of some doubt, whether justices of peace, as such, have power to hear and determine felonies, &c., and this doubt seems to have arisen from the general words of 34 E. 3, c. 1, which is express, that the persons assigned to keep the peace shall have power, among other things, to hear and determine felonies, &c.

Cro. Ja. 32; Yelv. 46; 2 Roll. Rep. 151; Dyer, 69, pl. 29; 2 Hawk. P. C. c. 8, § 33.

But it seems to be now settled, that justices of peace have no power to hear and determine felonies, unless they be authorized so to do by the express words of their commission; and that their jurisdiction to hear and determine murder, manslaughter, and other felonies and trespasses, is by force of the second *assignavimus* in their commission, which gives them, or two of them, whereof one of the quorum, power to hear and determine felonies, &c.

Stamf. P. C. 53; Crompt. 120; 2 H. H. P. C. 43; 2 Hawk. P. C. c. 8, § 33.

And hence it hath been lately adjudged, that the caption of an indictment of trespass before justices of the peace, without adding *necnon ad diversas felonias, &c. assignat.*, is naught.

Dominus Rex v. Carter, Trin. 7 Geo. 1, in B. R.

But, though justices of peace, by force of their commission, have authority to hear and determine murder and manslaughter, yet they seldom exercise a jurisdiction herein, or in any other offences in which clergy is taken away; and this, says my Lord Hale, is for two reasons:

1. By reason of the monition and clause in their commission, *viz.*, in cases of difficulty to expect the presence of the justices of assize.

2 H. H. P. C. 46.

2. By reason of the statute of 1 & 2 P. & M. c. 13, which directs justices of the peace, in case of manslaughter and other felonies, to take the examination of the prisoner, and the information of the fact, and put

the same in writing, and then to bail the prisoner, if there be cause, and to certify the same, with the bail; at the next jail-delivery; and therefore in cases of great moment, they bind over the prosecutors, and bail the party, if bailable, to the next jail-delivery; but in smaller matters, as petty larceny, and some cases they bind over to the sessions. But this is but in point of discretion and convenience, not because they have not jurisdiction of the crime.

3. *What in relation to inferior Offences.*

The jurisdiction herein given to justices of peace by particular statutes is so various, and extends to such a multiplicity of cases, that it were endless to endeavour to enumerate them: also, they have, as justices of the peace, a very ample jurisdiction in all matters concerning the peace.

6 Mod. 128.

And, therefore, it hath been holden, that not only assaults and batteries, but libels, barratry, and common (*a*) night-walking, and haunting bawdy-houses, and such like offences, which have a direct tendency to cause breaches of the peace, are cognisable by justices of the peace, as trespasses within the proper and natural meaning of the word.

Lev. 139; Sid. 271; {2 East, 5, the King v. Higgins.} (*a*) Latch. 173; Poph. 208; Cro. Ja. 32; Yelv. 46.

But neither perjury nor forgery at common law, nor any other such like offences, which do not directly tend to cause a personal wrong or open violence, are cognisable by them, unless it be by the express words of their commission, or some statute.

Salk. 406, pl. 2; Crompt. 120; Lamb. B. 1, c. 12. β An error of a magistrate in a case where he has authority, does not make the proceeding *ipso facto* void. Farrell's Petition, 2 N. H. Rep. 123; Blanchard v. Goss, 2 N. H. Rep. 491.*g*

β The interest of a justice of the peace in a penalty, however trivial the interest, takes away his jurisdiction of the offence.

Pearce v. Atwood, 13 Mass. 324.*g*

{ No new offence created by statute is within their jurisdiction, unless, expressly made cognisable thereby.

Salk. 406, Regina v. Yarrington; Ibid. 680, Regina v. Smith; 4 Mod. 379, Rex et Regina v. Buggs; 5 Mod. 149, Rex v. Clough; Str. 1256, Rex v. James; 1 Mass. T. Rep. 59, Commonwealth v. Leach; 2 Mass. T. Rep. 530, Commonwealth v. Knowlton.

|| The justices are empowered by a recent act of parliament to inflict summary punishment, in certain cases of wilful and malicious trespasses on public or private property. This act is so important, and the jurisdiction it confers is so strongly guarded, that I will not attempt to abridge it, but will set it out at length. By 1 G. 4, c. 56, "If any person or persons shall wilfully or maliciously do or commit any damage, injury, or spoil, to or upon any building, fence, hedge, gate, stile, guide-post, milestone, tree, wood, underwood, orchard, garden, nursery-ground, crops, vegetables, plants, land, or other matter or thing growing or being thereon, or to or upon real or personal property, of any nature or kind soever, and shall be thereof convicted within four calendar months next after the committing of such injury, before any justice of the peace for the county, riding, division, city, town, or place where such offence shall have been committed, either by the confession of the party offending, or by the oath of one or more credible witness or witnesses, or of the party aggrieved in the premises, which oath such justice is hereby empowered to administer, every person so offending, and

being thereof convicted as aforesaid shall forfeit and pay to the person or persons aggrieved, such a sum of money as shall appear to such justice to be a reasonable satisfaction and compensation for the damage or injury or spoil so committed, not exceeding in any case the sum of five pounds, which said sum of money shall be paid to the person or persons aggrieved; but in case such conviction shall take place on the sole evidence of the party aggrieved, then and in such case such satisfaction and compensation shall be paid to the overseer or overseers of the poor of the parish, township, or place where the offence was committed; or if the conviction shall take place in Ireland, then such satisfaction and compensation shall be paid to the governor of the fever hospital or infirmary of the county, city, town, or place where the offence shall have been committed, to be by him or them applied for the relief and maintenance of the poor thereof, or of the establishment of such fever hospital or infirmary; and in default of payment of the sum of money in which the offender or offenders shall have been so convicted as aforesaid, immediately, or within such time as the justice shall appoint at the time of conviction, together with all costs, charges, and expenses attending the conviction, such justice shall and may commit such offender or offenders to the common jail or house of correction, there to be kept to hard labour for any time not exceeding three calendar months, unless such penalty, costs, and charges, shall be sooner paid and satisfied: provided always, that if any such damage, injury, or spoil, shall have been done or committed as aforesaid, to or upon any church, chapel, bridge, building, common way or other property whatsoever, whether real or personal, of a public nature, or wherein any public right is concerned, it shall or may be lawful to and for any such justice to proceed against and convict the offender or offenders, within the time aforesaid, and in the manner aforesaid, in any sum not exceeding five pounds, as to such justice shall seem just and reasonable, at the instance and upon the information of any person prosecuting such offender or offenders, and to order and direct one moiety of the sum to be paid for such offence to be paid to the person so prosecuting, and the other moiety to and for the use of the poor of the parish, township, or place where the offence shall have been committed; and in default of payment of the sum in which any such offender or offenders shall have been so convicted as aforesaid, together with all costs, charges and expenses attending such conviction as aforesaid, such justice shall and may commit such offender or offenders to the common jail or house of correction, there to be kept to hard labour for any time not exceeding three calendar months, unless such penalty, costs, and charges shall be sooner paid and satisfied."

§ 2. "If any male person or persons under the age of sixteen years shall offend against any of the provisions of this act, it shall be lawful for the justice before whom he or they shall have been convicted, in default of payment of the sum of money awarded against him or them by the said justice, together with all costs, charges, and expenses attending such conviction, immediately, or within such time as the justice shall appoint at the time of conviction, to commit such offender or offenders to the house of correction, there to be corrected and imprisoned, and kept to hard labour, for any term not exceeding six weeks."

§ 3. "For the more easy bringing of offenders against this act to justice, it shall be lawful for any constable or other peace officer, and to and for the owner or owners of any property so damaged, injured, or spoiled, and for his, her, or their servant or servants, or other person or persons acting by

or under his, her, or their authority, and for such person or persons as he, she, or they, may call to his, her, or their assistance, without any warrant or other authority than by this act, to seize, apprehend, and detain any person or persons who shall have actually committed, or be in the act of committing, any offence or offences against any of the provisions of this act, and to take him, her, or them before any justice of the peace for the county, city, or place where the offence or offences shall be committed; and such justice is hereby empowered and required to proceed and act, with respect to such offender or offenders, in manner by this act directed."

§ 5. "It shall be lawful for any person or persons so convicted by any justice of the peace, as before mentioned, of any offence or offences against this act, to appeal to the justices of the peace assembled at the general quarter sessions or general sessions to be holden for the county, riding, division, city, town, or place where such conviction shall be made, next after seven days from the time of such conviction, on giving immediate notice of such appeal and of the matters thereof, and finding sufficient security, to the satisfaction of such justice, for prosecuting the said appeal with effect, and abiding the determination of the court therein; and such justices, in such general quarter sessions or general sessions, shall hear and determine the matter of such appeal, and may either confirm or quash and annul the said conviction, and award such costs to either party, as to them the said justices shall seem just and reasonable; and the decision of the said justices therein shall be final, binding, and conclusive; and no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form only, or be removed by *certiorari*, or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster, or elsewhere, any law or statute to the contrary thereof in anywise notwithstanding; and if upon the hearing of any such appeal, the judgment of the justice before whom any appellant shall have been convicted shall be confirmed, such appellant shall forthwith pay the penalty and costs awarded to be paid by such appellant, or in default thereof, shall be immediately committed by the said court to the common jail or house of correction, there to remain for any time not exceeding six calendar months, unless such penalty and costs shall be sooner paid."

§ 6. "Nothing in this act contained shall repeal or affect any act or acts now in force, whereby any person or persons may be subject to punishment for wilful and malicious acts of trespass to any property, either public or private, or shall extend to any case of wilful or malicious mischief or trespass to private property, in which the damage claimed shall exceed the sum of five pounds, or to any case wherein it shall appear to the satisfaction of the justice or justices before whom the complaint is made, that the party trespassing acted under a fair and reasonable supposition that he had a right to do the act to the property in respect whereof the trespass was committed or alleged to have been committed, or to do or commit the act complained of; or shall have committed such trespass in hunting, or being a qualified person, and having duly obtained his certificate authorizing him to kill game, shall have committed the injury complained of in the pursuit of any kind of game."

§ 7. "In case any person or persons shall be convicted of any offence against this act, before any justice of the peace, on the complaint or information of any person or persons, or public or private property having been so injured, damaged, or spoiled, and shall have paid the penalty, costs, and

charges under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, then and in every such case such conviction shall and may be pleaded in bar of any action, suit, or information that shall be commenced, instituted, or prosecuted for such and the same offence in any court whatsoever."

§ 8. "This act shall be in force in England and Ireland, and not in any other part of the United Kingdom."

A justice of the peace has authority to issue his warrant for the arrest of a party charged with having published a libel, and upon neglect of the party to find sureties may commit him to prison, there to remain till delivered by due course of law.

Butt v. Conant, 1 Bro. & Bing. 548; 4 Moo. 195.

Where in replevin the defendant makes cognisance that he took the goods as a distress, under an adjudication of a magistrate on the statute of labourers, averring a complaint made to the magistrate on oath, and an examination on oath, and adjudging a sum of money to be paid by the plaintiff to J C for wages, the plaintiff cannot plead in bar that the servant did not duly make oath before the magistrate that the sum was justly due for wages, nor that the sum claimed was not due.

Wilson v. Weller, 1 Bro. & B. 57; and see 6 East, 75; 14 East, 605; Wightw. 22.‖

4. *How far they have Power to proceed on Indictments not taken before themselves.*

Justices of the peace may proceed upon indictments taken before their predecessors, which depends upon the statutes 11 H. 6, c. 6, and 1 E. 6, c. 7, § 6, the former of which, reciting the inconveniences that pleas and processes upon indictments before justices of the peace had often been discontinued by making new commissions of the peace, to the great loss of the king, &c., ordains, that such pleas, suits, and processes before justices of the peace shall not be discontinued by new commissions of the peace, but stand in force, and that the new justices, after they have the records of the same pleas and processes before them, may continue, and finally hear and determine the same; and this is confirmed by the 1 E. 6, c. 7.

2 H. H. P. C. c. 46; 2 Hawk. P. C. c. 8, § 31.

But justices of the peace have no power to proceed on indictments taken before a coroner, or before justices of oyer or jail-delivery, or to deliver persons suspected by proclamation.

2 H. H. P. C. c. 46.

But, if an indictment be taken before the sheriff in his tourn, it is by the statute of 1 E. 4, c. 2, to be delivered to the justices of peace at their next session, who are to award process thereon the same as if it was taken before them, and to arraign, and deliver or fine the defendant.

2 H. H. P. C. c. 46. ‖ The authority with which justices of the peace were invested had so much lessened the business of the tourn, that persons interested in the support of those courts had been induced to try unfair means of supplying the loss of their profits. This is the reason assigned in the preamble to the act of E. 4, for this transfer of judicature from the tourn to the quarter sessions.‖

5. *By what Justice the Jurisdiction must be exercised; and therein, how far a Justice of a County may act out of it, or within a Liberty.*

Every single justice has regularly a jurisdiction through the whole county, which he alone may exercise for the preservation of the peace; and this jurisdiction he has by virtue of his commission, which consti-

tutes him a justice of peace; but the power of hearing and determining offences is by the commission given to two, or more, (*a*) *quorum unus, &c.*, and therefore if two justices, *quorum unus*, be empowered to do a thing, it must appear that one was of the quorum.*

2 H. H. P. c. 44; 5 Mod. 322; Comb. 200. (*a*) Cannot be a session without a justice of the quorum, 3 Mod. 14, 152; 2 Ld. Raym. 1238.——*Orders of justices are not to be vacated, for not expressing one of them to be of the quorum. 26 Geo. 2, c. 27. [And by 7 Geo. 3, c. 21, in cities, boroughs, towns corporate, franchises, and liberties, which have only one justice of the quorum; all acts, orders, adjudications, warrants, indentures of apprenticeship, or other instruments, done or executed by two or more justices qualified to act therein, shall be valid, although neither of the said justices shall be of the quorum.]

So, if a thing be required to be done by two justices, they must both be present at the execution of it; as, if two justices adjudge a person the father of a bastard child, and the examination is said to be by one of them, this is naught; for the examination being a judicial act ought to be by both, and it is not sufficient that one of them examined, and made a report to the other. But, if they are both present, and one alone examines, or asks questions, it is well enough. So, where two justices are enabled to bail a person, they ought both to be present to do it, and not one of them first to sign the recognisance, and then send it to another.

6 Mod. 180; 2 Salk. 477; Billings v. Prinn, 2 Bl. Rep. 1017. Vide tit. *Bastardy*, (D). [Where the act to be done is of a *judicial* nature, the justices must both be present at it, as in the instances put in the text, and in making orders of removal, R. v. Wyke, Andr. 238; appointing overseers, R. v. Forrest, 3 T. R. 38; R. v. Great Marlow, 2 East, 244; assenting to the binding of parish apprentices, R. v. Hamstall Ridware, 3 T. R. 38; but, where the act to be done is merely *ministerial*, the concurrence of the justices together is not requisite; as, it seems, in the allowance of a poor-rate. R. v. Justices of Dorchester, 1 Star. 393.] β An order of filiation is a judicial act, and must be executed by the justices jointly and not separately. State v. Prall, 5 Halst. 161.*g*

A single justice cannot bail a person, that is committed by order of the sessions; for he that bails must have as high a power as he who commits.

Keb. 857, 897. Vide tit. *Bail*. β When a justice of the peace has authority to inquire into an offence, and to bail the offender, he may take a recognisance for his appearance before him from time to time, pending the examination. Comm. v. Ross, 6 S. & R. 427.*g*

[One magistrate cannot supersede the warrant of commitment of another magistrate without a legal inquiry and examination of the matter.

R. v. Brooke, 2 T. R. 190.

But whatsoever power is given to a justice, or to two justices of the peace, by any statute, is given to the sessions of the peace, which consists of a collection of justices.

2 Keb. 78.

It has been holden, that where a statute says the next justice, it must be the next; but where it says the justices of the peace in or near the place, there any justice of peace in the county will serve.

2 Keb. 559.

[So, the statute of 43 Eliz. c. 2, § 1, for the appointment of overseers, which makes mention of *justice in or near the parish of division*, Lord Mansfield said was only directory.

R. v. Loxdale, 1 Burr. 447.

So, where a statute directs an act to be done by justices *acting for the*

division, any justice within the county, acting within the division, is for this purpose a justice of the division.

R. v. Price, Cald. 305. See Respublica v. M'Clean, 4 Yeates, 399; Comm. v. Sheriff, &c., 4 S. & R. 276.*g*

So, the authority given by the stat. of 43 Eliz. c. 7, to convict before any justice, &c., *of the county, city, or town corporate, where the offence shall be committed*, is constructively given to any justice, &c., of any *place, district, or liberty*, in any county where, &c., as to a magistrate of the Isle of Ely in the county of Cambridge.

R. v. Stevens, Cald. 302.]

Justices of the peace are to execute their authority as justices of the peace within the county wherein they are justices, and cannot regularly do a judicial act out of such county.

2 H. H. P. C. 50; 2 Hawk. P. C. c. 8, § 29. *β* A justice of the peace cannot execute any act or perform any judicial functions out of his proper county. Share v. Anderson, 7 S. & R. 63. But see Pearson v. Howey, 6 Halst. 12; 1 Root, 202, 300, 313, 403.*g*

Therefore if a justice of peace live or be out of the county wherein he is justice, he cannot by his warrant fetch a person out of the county whereof he is justice, to come before him in the county where he is.

13 E. 4, 8 b, Plow. 37 a, Platt's case.

And as justices of the peace have no coercive power out of their county, they cannot make an order of bastardy, or such like orders, out of their county.

2 Hawk. P. C. c. 8, § 29.

But a justice of peace, as we have already seen, may do a ministerial act out of the county, such as examine a party robbed, whether he knows the felons according to the statute or not.

Cro. Car. 211; Jon. 239. {See 1 John. Rep. 498; Jackson v. Humphrey.}

Also, by the better opinion, recognisances and informations voluntarily taken before them in any place are good; for those, says my Lord Chief Justice Hale, are acts of voluntary jurisdiction, and may be done out of the county, as well as a bishop may grant administration, institution, or orders out of his diocese.

2 Hawk. P. C. c. 8, § 20; 2 H. H. P. C. 51.

But a justice of peace cannot imprison a person for not giving a recognisance, or commit a person for a crime, for these are acts of compulsory jurisdiction, which he cannot exercise out of his proper county.

2 H. H. P. C. 51.

If A commits a felony in the county of B, where he lives, and goes in the county of C, and is there taken, a justice of the peace of the county of C may take his examination and informations in the county of C, though the felony were committed in the county of B. But my Lord Hale says, that upon his arraignment in the county of B he would never allow these examinations to be given in evidence; because though he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence, or commit them; yet that is but for necessity of preserving the peace, for he hath really no jurisdiction in the case.

2 H. H. P. C. 51.

If A commit a felony in the county of B, and upon a warrant issued against him by a justice of peace in the county of B, he is pursued and

flies into the county of C and there is taken, he must not, by virtue of that warrant, be carried to a justice of peace of the county of B, where he committed the felony, but to a justice of peace in the county of C, where he was taken.

H. H. P. C. 580.

But, if A were taken by the warrant in the county of B, and break away into the county of C, and be there taken upon fresh suit by them that first took him, he may be either brought to a justice of the county of C, where he was last taken, or before the justice of the county of B, by whose warrant he was first taken, for in supposition of law he was always in custody.

H. H. P. C. 581.

But, if he escape before arrest into another county, if it be a warrant barely for a misdemeanor, it seems the officer cannot pursue him into another county, because out of the jurisdiction of the justice that granted the warrant; but in case of felony, affray, or dangerous wounding, the officer may pursue him, and raise hue and cry upon him into any county; but if he take him in a foreign county, he is to bring him to the jail or justice of that county where he is taken, for he doth not take him purely by the warrant of the justice, but by the authority which the law gives him, and the justice's warrant is a sufficient cause of suspicion and pursuit.

2 H. H. P. C. 115.

If A be a justice of peace in two adjacent counties, though by several commissions, as the recorder of London is, he, whilst he lives in one county, may send his warrant to apprehend malefactors in another, and send them to Newgate, which is the common jail both for London and Middlesex.

2 H. H. P. C. 581.

The justices of the peace have jurisdiction of felonies arising within the verge.

4 Co. 46 a, Wigg's case; 2 H. H. P. C. 52.

Justices of the peace for a county have, by their commission, an express authority as well within liberties as without, and may execute their office within a town which has a special commission of the peace for its own limits, unless such a commission have a clause that no other justices, except those named in it, (*a*) shall any way concern themselves in the keeping of the peace within the liberties of such town.

2 Hawk. P. C. c. 8, § 29; 2 H. H. P. C. 49. (*a*) [For without express words, without a *ne intromittant* clause in the commission or charter, the county justices shall not be excluded. Blankley v. Winstanley, 3 T. R. 279; Talbot v. Hubble, 2 Str. 1154; R. v. Sainsbury, 4 T. R. 456.] ‖ In the case of Talbot v. Hubble, *supra*, it was determined, that though the 12 Car. 2, gives the jurisdiction in excise matters to the justices of the peace residing near the place where the forfeiture shall be made, or offence committed; yet it was never the design of the legislature to make any alteration in the respective jurisdictions of the justices, but only to vest the excise jurisdiction in justices of counties, cities, and places, with respect to their several local jurisdictions within such places.‖

Also, it seems, that though such commission have a special exclusive clause, of which the justices have notice, yet their acts within a liberty are not void, though perhaps they may be punished for proceeding in defiance of such restrictive clause, as for a contempt of the king's prohibition.

H. H. P. C. 47; 2 Hawk. P. C. c. 8. § 29.

‖By 28 G. 3, c. 49, "Any justice or justices of the peace, acting as such for any two or more counties being adjoining counties, may act as a justice or justices of the peace in all matters and things whatsoever, con-

cerning or in any wise relating to any or either of the said counties, and that all act and acts of such justice or justices of the peace, and the act and acts of any constable or other officer in obedience thereto, shall be as valid, good, and effectual in the law, to all intents and purposes whatsoever, as if such act or acts of the said justice or justices had been done in the county or counties to which such act or acts more particularly relate; and all constables and other officers of the said county or counties to which such act or acts relate, are required to obey the warrants, orders, directions, act and acts of such justice or justices so granted, given, and done, and to do and perform their several offices and duties, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty: provided always, that such justice or justices be personally resident in one of the said counties at the time of doing such act or acts: provided also, that the warrants, orders, or directions, so to be given and granted, be directed and given in the first instance to the constable or other officer of the county to which the same more particularly relate."

§ 2. "Be it further enacted, by the authority aforesaid, that any constable, tythingman, headborough, or other peace officer, or any other person or persons apprehending or taking into custody any person or persons offending against law, and whom they lawfully may and ought to apprehend and take into custody by virtue of his or their office or offices, or otherwise howsoever, may convey and take the person or persons so apprehended or taken into custody as aforesaid, to any justice or justices of the peace acting for the said county, and resident in such adjoining county as aforesaid; and the said constables, tythingmen, headboroughs, and other peace officers, and all and every other person or persons, are required in all such cases, so to act in all things as if the said justice or justices of the peace was or were resident within the said county to which they respectively belong; and all and every person or persons obstructing or hindering the said constables, tythingmen, headboroughs, or other peace officers in the execution of their respective offices, in the said county or counties adjoining as aforesaid, shall be liable to the same pains and penalties, for such obstruction and hinderance of the said officers in the execution of their respective offices, as if the same had been committed in the county for which the said constables, tythingmen, headboroughs, or other peace officers, were appointed to act."

§ 3. "It shall be lawful for any sheriff, or other person or persons deputed by him, or acting under his authority, constable, headborough, tythingman, or other peace officer, or any other person or persons lawfully taking into, or having in his or their custody respectively, any person or persons offending against law, and whom he or they may or might lawfully convey to jail, or any place of safe custody, to convey or take the said person or persons so in custody as aforesaid, into and through any part or parts of the said county or counties so adjoining in their way to such jail or place of safe custody within the county wherein such offence was done or committed; and all and every person or persons escaping from such custody as aforesaid, or aiding or assisting such escape or escapes, or rescuing such person or persons so in custody as aforesaid, shall be subject to the like pains and penalties for such escape or escapes, and for such aid and assistance so given as aforesaid, and for such rescue and rescues, as if the said escape or escapes had happened, or such aid and assistance had been given, or such rescue or rescues made, in the county wherein such offence was done or committed."

(E) Of their Authority and Jurisdiction, &c.

By stat. 1 & 2 G. 4, c. 63, reciting stat. 28 G. 3, c. 49, and that doubts had been entertained whether justices of the peace for counties at large were thereby empowered to act for such counties at large, within any city, town, or other precinct having exclusive jurisdiction, but not being a county of itself, it is enacted that it shall be lawful for any justice of the peace acting for any county at large, or for any riding or division, &c., to act as a justice for such county at large, riding, or division, in sessions or otherwise, at any place within any city, town, or other precinct having exclusive jurisdiction, but *not being a county of itself*, and situate within, surrounded by, or adjoining to any such county at large, riding, or division, and all acts, matters, and things done by such justice within such city, town, &c., shall be as valid as if done within the said county, riding, &c., provided that nothing therein shall give power to justices of the peace for any county, riding, &c., not being justices for such city, town, &c., or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, &c.

By 9 G. c. 7, as explained by the 4th section of this act of 28 G. 3. "Any justice or justices of the peace, acting for any county at large, may act as such at any place within any city, town, or other precinct, being a county of itself, and situate within, surrounded by, or adjoining to any such county at large; and all and every such act and acts, matters and things, done by such justice or justices of the peace for the said county at large, within such city, town, or other precinct, shall be as valid and effectual in the law as if the same had been done within the said county at large, to all intents and purposes whatsoever: provided that nothing in this act shall extend to give power to the justices of the peace for any county at large, not being justices for such city, town, or other precinct, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever."

By 60 G. 3 & 1 G. 4, c. 14. "The justices of the peace acting within and for any town, liberty, soke, or place, not being a county, but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall have full power within their respective limits, at their discretion, to commit any person duly charged before them, or any of them, with any capital offence committed within such limits, to the jail of the county within which such town, liberty, soke, or place shall be situated, there to be tried at the next session of oyer and terminer or general jail-delivery, to be held in and for such county, in the same manner as if such offence had been committed within any other part of the same county, and as if such person had been committed by any justice of the same county, not being within such limits."

§ 2. "And in all cases where any justice or justices of the peace, under the authority of this act, shall commit any person to the county jail, it shall be lawful for such justice or justices, and he and they is and are hereby authorized and required also to bind over all necessary parties and witnesses by recognisance, to prosecute and give evidence against such offenders at the next sessions of oyer and terminer and general jail-delivery, and to transmit such recognisance, and all depositions taken before him or them relating to the charge, to the clerk of the crown, clerk of assize, or other proper officer, to be filed in the court of oyer and terminer and general jail-delivery for such county, to the intent that the same may be used or put in

force by the judge or judges of the said court, as he or they shall deem proper, according to law."

§ 3. "In all cases of any commitment to the county jail, under the authority of this act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke, or place within which such offence shall have been committed, in like manner and be raised by the same means whereby such expenses would have been raised and paid if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction; and that the judge, or courts of oyer and terminer and general jail-delivery, shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper; and also to direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who by the custom and usage of such place ought to pay the same in the first instance." ||

By 24 G. 2, c. 55, if any person against whom a warrant shall be issued, shall escape, go into, reside, or be in any place out of the jurisdiction of the justice granting the warrant, any justice of the peace where such person shall be, upon proof on oath of the handwriting of the justice granting such warrant, shall endorse his name thereon, (*a*) which shall be a sufficient authority to execute the warrant within such other jurisdiction.

(*a*) || It seems from the construction of a similar clause in 35 G. 3, c. 101, that it is peremptory on the magistrate under these circumstances to endorse his name on the warrant: he acts therein ministerially, and has nothing to do with the propriety of granting the warrant. R. v. Kynaston, 1 East, 117.||

And the justice may further order (if he thinks fit) the party, according as he shall appear bailable or not bailable upon the face of the warrant, to be brought before himself or some other justice or justices of that county, or to be carried back into the county from which the warrant issued.

[Under the statute 11 G. 2, c. 19, for the more effectual securing of the payment of rents and preventing of frauds by tenants, justices either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties.

R. v. Morgan, Cald. 156.]

|| By 33 G. 3, c. 55, § 3. "In all cases where any penalty, forfeiture, fine, or other money, may by the warrant of any justice or justices of the peace be directed to be levied by distress and sale of the goods and chattels of any person or persons, if sufficient distress cannot be found within the limits of the jurisdiction of the justice granting such warrant of distress, on oath thereof made by one witness, before any justice of the peace of any other county, riding, division, city, borough, town corporate, or place, (which oath shall be by him certified by endorsement on such warrant,) such penalty, forfeiture, fine, or other money, or so much thereof as may not have been before levied or paid, shall and may, by virtue of such warrant and endorsement, be raised and levied by the person or persons to whom such warrant of distress shall have been originally directed, by distress and sale of the goods and chattels of such person or persons, in such other county, riding, division, city, borough, town corporate, or place;

and the money arising by such distress and sale shall be applied and disposed of for such purposes, and in like manner, as if sufficient goods and chattels of such person or persons had been found within the jurisdiction of the magistrate originally granting such warrant; and if no such distress can be found, such offender or offenders shall and may be forthwith proceeded against according to law: provided always, that no justice who shall endorse any certificate upon, or authorize the execution of any such warrant of distress which may not have been granted within his jurisdiction, shall be answerable or accountable for any irregularity which may have been committed or done in or about the obtaining or granting of such warrant of distress." ||

Where two sets of magistrates have a co-ordinate jurisdiction within a district, they may all act together; but, if the jurisdiction previously attach in the one set, any attempt in the other set to wrest it from them is illegal, and the subject of an indictment.

R. v. Sainsbury, 4 T. R. 451.

The jurisdiction of justices of the peace and of commissioners of excise is, as to the excise laws, exactly the same, within their respective jurisdictions.

R. v. Whitebread, Dougl. 551, n.

The jurisdiction of justices of the peace and of commissioners under the hackney-coach statutes is co-extensive, and therefore, a justice of the peace after convicting a coachman for refusing to go with his coach may immediately commit him to the house of correction, if he do not pay the penalty.

9 Ann. c. 23; 1 G. 1, st. 2, c. 57; 7 G. 3, c. 44; 10 G. 3, c. 44; Duck v. Addington, 4 T. R. 447.

Regularly, a justice of the peace ought not to execute his office in his own case; but cause the offenders to be convened or carried before some other justice, or desire the aid of some other justice being present. And, therefore, the mayor of Hereford was laid by the heels for setting in judgment where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court.

Dalt. c. 173. β See Tracey v. Williams, 4 Conn. 107; Pearce v. Atwood, 13 Mass. 341. *g* Per Holt, C. J., 1 Salk. 396. β A justice being he owner of a promissory note payable to A, or bearer, instituted a suit upon it in the name of B, returnable before himself, rendered judgment by default, and issued an execution against the defendant, under which he was arrested and committed to prison; held, the justice was a trespasser. Dyer v. Smith, 12 Conn. 384. *g*

β It is a high misdemeanor for a justice of the peace to act as agent for one of the parties litigating before him.

Boyer v. Potts, 14 S. & R. 157. *g*

So, where a justice of the peace who was surveyor of the highways, joined in making an order at the sessions in a matter which concerned his office, and his name was put in the caption, the order was for this reason quashed.

Case of Foxham Tithing in Wilts, 2 Salk. 607.

So, an order of removal of a poor person from Great Chart to Kennington was quashed, because one of the justices who made the order was an inhabitant of Great Chart at the time, and charged to the poor rate there.

Burr. Settl. Ca. 194.

This last determination seemeth to have given occasion to the stat. 16 G. 2, c. 18, which enacts, that the justices may do all things appertaining to their office, so far as the same relates to the laws for the relief, maintenance, and settlement of the poor; for passing and punishing vagrants; for repair of the highways; or to any other laws concerning parochial taxes, levies, or rates, notwithstanding that they are rated, or chargeable with the rates within any place affected by such their acts. Provided, that this act shall not empower any justice for any county at large, to act in the determination of any appeal to the quarter-sessions of such county, from any order, matter, or thing relating to any such parish, township, or place, where such justice is so charged or chargeable.

|| In the case of R. v. Yarpole, 4 T. R. 71, it was determined, that on an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes have no right to vote.||

[And in some cases, if the justice shall act in his own cause, it seemeth to be justifiable, as, when a justice shall be assaulted; or, (in the execution of his office especially,) shall be abused to his face, and no other justice present with him; then, it seemeth, he may commit such offender until he shall find sureties for the peace for his good behaviour, as the case shall require; but, if any other justice were present, it were fitting to desire his aid.

Dalt. c. 173; R. v. Revel, 1 Str. 420.]

||Whether a magistrate, not sitting as chairman of a court, but in his private office, can commit for a contempt, does not seem to be expressly decided. But, if he can so commit, it is most clear, that he cannot do it by word of mouth only, without warrant in writing.

Petit v. Addington, Peake's Rep. 62; Mayhew v. Locke, 7 Taunt. 63; 2 Marsh. 377, S. C.||

[Justices of the peace, it seemeth, may supersede their own order *quia improvidè emanavit*, if it have not been acted upon.

Parishes of Pancras and Rumbald in Sussex, 1 Str. 6; 1 Sess. Ca. 106; No. 98, S. C.

Lord Hale saith, (contrary to the opinion of Lord Coke,) that the justices out of sessions may issue their warrant for apprehending persons charged with crimes within the cognisance of the sessions, and bind them over to appear at the sessions, although the offender be not yet indicted. But in another place he saith, this seemeth doubtful; and one thing which seemeth to make against it is, that in most cases of this nature, though the party were indicted, or an information preferred, yet a *capias* was not the first process, but a *venire facias* and *distringas*. And Serjeant Hawkins on this point saith thus: It seems, that anciently no one justice could legally make out a warrant for an offence against a penal statute or any other misdemeanor, cognisable only by a sessions of two or more justices; for that one single justice hath no jurisdiction of such offence, and regularly, those only who have jurisdiction over a cause can award process concerning it: yet the long, constant, universal, and uncontrolled practice of justices of the peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests, not now to be disputed. However, as Dr. Burn (*a*) very well observes, the authority of justices of the peace being by the statute law, and no statute having expressly given to them such power, (unless in special cases, which operate against, rather than establish a general power,) it

seemeth best in ordinary cases, and more consonant to the practice of the superior courts, to issue a summons against the offender, and not a warrant, in the first instance; unless in cases of felony, or where the offender in other respects is to suffer corporal punishment.

1 H. H. P. C. 579; Ibid. 2 H. H. P. C. 113; 2 Hawk. P. C. c. 13, § 16. (*a*) Vol. 3, tit. *Justices*, &c. 31.

By the act of 18 Geo. 3, c. 19, justices of the peace are enabled to give costs upon complaints determined before them out of sessions; and by the 33 Geo. 3, c. 55, to impose fines upon constables, overseers of the poor, and other peace or parish officers for neglect of duty, and on masters of apprentices for any ill usage of their apprentices, whether bound by any parish or township or otherwise, provided that not more than the sum of ten pounds be paid upon the binding of them.]

||In all cases where justices have power to *hear and determine* out of their sessions, (viz., on their own view, or confession, or oath of witnesses,) if upon such conviction the offender is to be committed to jail, the justices ought to make a record in writing under their hands of all the matters and proofs; which record notwithstanding in many cases they may keep by them.]

Dalt. Just. 376. *β* See Tracey v. Williams, 4 Conn. 107; Holcomb v. Cornish, 8 Conn. 375.*g*

If upon such conviction the offender is to be fined to the king, then the justices are to estreat such fine, and to send the estreat into the exchequer, whereby the barons of the exchequer may cause the said fine or forfeiture to be levied to the king's use.

Dalt. Just. 376.

In all cases a justice of the peace ought to return a conviction by him to the sessions, whether the party appeals or not, or whether an appeal is or is not given, that the crown may not be deprived of its share of forfeitures.

R. v. Eaton, 2 T. R. 285.

By 41 G. 3, c. 85, it is enacted, "that it shall be lawful for every justice of the peace acting out of sessions for any county, riding, city, borough, division, or place in England, to receive all fines, forfeitures, and penalties, imposed by him or any other justice of the peace as aforesaid, acting out of sessions, and not made payable to any body or bodies corporate, or any commissioners of any public boards, or any other person or persons, and to give receipts for the same, which receipts shall be a sufficient discharge to the parties by whom the said fines shall be payable; and every such justice shall, by himself or clerk, keep an account in a book, to be provided for that purpose, of the amount of every fine, forfeiture, or penalty, which shall have been set or imposed by any adjudication or order made by every such justice, specifying the place, and time, and manner of such adjudication or order, the nature of the offence, and the act or acts under which the same was adjudged, and the name or names of the person or persons on whom such fine, forfeiture, or penalty was set or imposed; distinguishing whether the same was paid or levied, and what part or share thereof, if any, has been or shall be paid or payable to any body or bodies corporate, commissioners, or person or persons, with the name and description of such body or bodies, commissioners, person or persons, and the authority under which he, she, or they claimed such part or share; and shall annually, previous to

the Michaelmas sessions, pay into the hands of the sheriff of the county or city, and town and county having a separate sheriff, for which such justice shall have acted in imposing such fines, all such fines, forfeitures, or penalties, or the parts or shares of such fines, forfeitures, or penalties, as shall be due to his majesty, his heirs or successors; and the sheriff or his undersheriff is hereby required to give an acquittance for the same, which shall be a full discharge to every such justice, his heirs, executors, and administrators, for such fines, forfeitures, or penalties, or parts or shares thereof."

§ 2. "That every justice of the peace shall, previous to the Michaelmas sessions, annually transmit to the clerk of the peace of the county, city, or town, or clerk of the town within which such fine, forfeiture, or penalty shall have been imposed, an account in writing, stating the several fines, forfeitures, and penalties which have been imposed by him, and showing which have been received by him, and from whom, and for what offences; which account the clerk of the peace, or town-clerk, shall enter in his estreats, with the names of the justices, that the sheriff may be charged with the same in his apposal before the foreign apposer, to the end that the same may be set over and answered to the crown, in like manner as in the case of fines and forfeitures set or imposed at any session of the peace."

§ 3. "That as often as two or more justices shall act together in setting or imposing any fine, forfeiture, or penalty, then the said account shall be kept, and a copy of it shall be delivered or transmitted, and the payment as aforesaid shall be made by such one of the said two or more justices as shall reside at or near the place where such adjudication or order was made, or at or nearest the place where such general quarter sessions shall be held."

§ 4. "That the said several clerks of the peace or town-clerks, or their deputies, shall within ten days next after any such general quarter sessions of the peace in which such justice shall have returned any conviction as aforesaid, deliver to the bailiff or chief constable of the district where any person shall reside, who shall by law be entitled to any share or proportion of any fines, forfeitures, or penalties which shall have been had and received by any such justice as aforesaid, an account in writing of such fines, forfeitures, and penalties; which bailiff or chief constable shall transmit an account thereof to the petty constable of the parish, township, or place where such person shall reside, that notice may be given to the person so entitled, that he may, without delay, apply to such justice for his share of such fine, forfeiture, or penalty."

§ 5. "Provided, that nothing in this act shall be construed to extend to prevent the officers of the crown from allowing any fines, forfeitures, or penalties levied by justices of the peace for justices' wages, in the same manner as other fines are now allowed by law; and provided also, that it shall be lawful for the sheriffs, or any other persons empowered to allow the same, to have an allowance of the same poundage on the balance of such fines charged on them after an allowance for justices' wages, in like manner as for fines at the assizes."

By 7 G. 3, c. 21, it is enacted that in all such cities, boroughs, towns corporate, &c., as have *only one* justice of the peace of the quorum, all acts, orders, adjudications, warrants, indictments, or other instruments which shall be made, done, or executed by two or more justices of the peace within such cities, boroughs, towns corporate, &c., though neither of the said justices are of the quorum, are valid and effectual in law;

and by 4 G. 4, c. 27, the above provision is extended to cases of cities, boroughs, towns corporate, &c., having two or any other limited number of justices of the quorum.

By 15 G. 2, c. 24, it is *declared* and enacted, that in all cases where any person liable by law to be committed to the house of correction shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributing to the support of the house of correction of the county in which such liberty, &c., is situate, it shall be lawful for the justices of such liberty, &c., to commit such person to the house of correction of the county, which person so committed shall be dealt with to all intents as if committed by any justice of the county, &c.

The justices of the borough of Liverpool, under the 15 G. 2, c. 24, and 53 G. 3, c. 162, have authority to sentence an offender convicted before them at their sessions for petty larceny, and in execution of such sentence to commit him to the house of correction for the county of Lancaster.

Rex v. Houghton, 5 Maule & S. 300.

But they have not authority to commit to such house of correction a person convicted by them under the 51 G. 3, c. 143, (a local and personal act,) of being a rogue and vagabond within the meaning of the 17 G. 2, c. 5.

Rex v. Houghton, 5 Maule & S. 311.

The above act of 15 G. 2, c. 24, is a declaratory act, and should have a liberal construction, and, therefore, where justices of a borough contributing to the county rate have committed prisoners to the county house of correction for offences cognisable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there.—*Qu.* Also where a county magistrate, having concurrent jurisdiction, has committed a prisoner for an offence within the borough, whether the borough sessions have not the same power of ordering such prisoner to be brought before them for trial?

Rex v. Amos, 2 Barn. & A. 533; and see Rex v. Musson, 6 Barn. & C. 74. As to the jurisdiction of county and borough justices respecting imposition of rates, see Bates v. Winstanley, 4 Maule & S. 429; Rex v. Clarke, 5 Barn. & A. 655.

Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence. It was held, therefore, that a magistrate might issue a warrant to apprehend and bring before him a person charged with an offence under the Malicious Trespass Act, 1 G. 4, c. 56, (*a*) (see page 406,) especially after the offender had neglected a summons.

Bane v. Methuen, 2 Bing. R. 63. (*a*) Now repealed. See *post.*

Two justices may proceed under 12 G. 3, c. 61, §18, to adjudge a forfeiture of gunpowder unlawfully conveyed to the person seizing the same, but the conviction must show distinctly that the person to whom it is adjudged is the person who seized.

Rex v. T. Smith, 5 Maule & S. 133.

The statute 20 G. 2, c. 19, §4, enabling two magistrates, "upon application or complaint made upon oath by any master against such apprentice," as is described by the act touching any misdemeanor in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master and verified by oath of another person.

Finley v. Jowle, 12 East, 248.

Upon an appeal against an order for the allowance of overseers' accounts, a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal or on a question as to granting a case.

Rex v. Gudridge, 5 Barn. & C. 459; and see Rex v. Yarpol, *antè*, p. 417.

A prisoner, when examined before justices on a charge of felony, is not entitled as a right to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him, and, therefore, a magistrate is justified in removing a solicitor out of the room where such investigation is taking place.

Cox v. Coleridge, 1 Barn. & C. 37; and see Rex v. Borron, 3 Barn. & A. 432.

For a consolidation of the provisions relating to the building, repairing, and regulating jails and houses of correction, see the voluminous statute 4 G. 4, c. 64, and tit. "GAOL AND GAOLERS."

Prisoners committed to jail for trial who are able, but who refuse to work, are not entitled by law to have any food provided for them by the public, and, therefore, where a magistrate reported as an abuse to the justices at quarter sessions, that untried prisoners had been compelled to work at the treadmill, and the justices ordered that the treadmill should be applied to the employment of other prisoners, as well as those sentenced to hard labour, and that those committed to trial who were able to work, and had the means of employment offered them by which they might gain support, but who refused to work, should be allowed bread and water only, the Court of King's Bench refused a *mandamus* to compel the justices to order such prisoners any other food.

Rex v. Justices of N. Riding of Yorkshire, 2 Barn. & C. 286.

By 5 G. 1, c. 8, it shall be lawful for the church-wardens or overseers of any parish, where any wife or children shall be left by their husband or father, by warrant of two justices, to seize so much of the goods and chattels, and receive so much of the annual rents and profits of the lands and tenements of such husband, mother, or father, as such justices shall order, towards the discharge of the parish where such wife, or children are left for the providing for such wife, child, or children, which warrant being confirmed at the next quarter sessions, it shall be lawful for the justices of such quarter sessions to make an order for the church-wardens or overseers of the poor to dispose of such goods and chattels, or so much of them for the purposes aforesaid as the court shall think fit, and to receive the rents and profits, or so much of them as shall be ordered by the sessions as aforesaid, of his or her lands and tenements for the purposes aforesaid.

The order of justices on this statute should state *how much* of the goods and rents should be seized, and the subsequent order of confirmation by the sessions, should specify the *quantum* of relief to be appropriated out of such goods or rents, and limit a period for such appropriation, supposing such *prospective* order to be good.

A justice before whom a deserter is brought and committed to the county jail may, if the deserter is unable to bear the charge himself, direct the expenses of conveying him thither to be paid by the treasurer of the county to the constable of the parish who found and apprehended him in the parish, and conveyed him to jail.

Stable v. Dixon, 6 East, 163; Rex v. Pierce, 3 Maule & S. 62.

By the 53 G. 3, c. 127, § 7, if any one duly rated to a church or chapel rate, the validity whereof has not been questioned by any ecclesiastical court, shall refuse or neglect to pay the same, one justice for the county

may, on complaint of the church or chapel wardens, convene before any two or more justices any person so refusing or neglecting, and examine on oath into the complaint, and direct payment of what is due in respect to such rate, not exceeding 10*l.* above reasonable costs, and on refusal to pay, to levy the amount due; and any person aggrieved by any judgment may appeal to the quarter sessions: provided that nothing therein shall interfere with the jurisdiction of the ecclesiastical courts, to determine causes touching such rates; and provided, that if the validity of such rate, or the liability to pay it, be disputed, and the party disputing give notice thereof to the justices, (*a*) the justices shall forbear giving judgment thereupon.

(*a*) If the party summoned tells the justices, he will bring an action against any person levying the rate, as he thinks he has no right to pay it because he has no claim to or seat in the chapel; this is a sufficient notice within the act. Rex v. Chapel Wardens of Milnrow, 5 Maule & S. 248. But a mere statement to the justices, that the party disputes the rate, does not deprive them of jurisdiction. Rex v. Wrottesley, 1 Barn. & Adol. 648.

Where a single woman having been delivered of a bastard child was committed by *one* justice for refusing to answer inquiries as to who was the father, the commitment was held bad.

Ex parte Martin, 6 Barn. & C. 80.

Trespass lies against a justice committing a party charged with felony for re-examination for an unreasonable time, though there is no improper motive.

Davis v. Capper, 10 Barn. & C. 28.

By the 5 Geo. 4, c. 18, intituled *An act for the more effectual recovery of penalties before justices and magistrates on conviction of offenders, and for facilitating the execution of warrants by constables*, it is enacted, that whenever any penalty or forfeiture is directed to be recovered before any justice, such justice is empowered, on conviction of the offender, in default of payment of such penalty or forfeiture, together with reasonable costs, to cause the same to be levied by distress and sale of the goods of the offender, by warrant under the hand and seal of such justice, &c.; and in case, upon valuation of the goods, sufficient distress for payment of such penalties, &c., cannot be found, or in case it shall appear to such justice, either by confession of the offender or otherwise, that the offender has not sufficient goods whereupon the same may be levied within the jurisdiction of such justice, &c., no sale shall take place of the goods, but it shall be lawful for such justice, &c., to commit such offender to the common jail or house of correction, for such time and in such manner as in such acts directed; then and in every such case it shall be lawful for such justice, &c., at discretion to order the offender so convicted to be kept in safe custody until return made to such warrant of distress, unless such offender shall give security to the satisfaction of the justice, &c., for his appearance before him on the return of the warrant of distress (not more than eight days from the date of the security;) and such security may be by recognisance or otherwise; or in case it appear to the satisfaction of the justice that the offender has not goods within the jurisdiction of the justice whereon to levy all such penalties, &c., such justice, &c., may at his discretion, without issuing a warrant of distress, commit the offender for such time and in such manner as if a warrant of distress had been issued, and *nulla bona* returned thereon.

And by § 2, whenever it shall appear to any magistrate by whom any penalty or sum of money is adjudged to be paid on the return of such war-

rant of distress, that no sufficient goods of the offender or defendant can be found whereon to levy the sum and costs within the jurisdiction of such magistrate, or in case it shall appear to such magistrate, either by confession of the party or otherwise, that he have not sufficient goods within the jurisdiction of the justice, such justice at his discretion, without issuing any warrant of distress, may proceed in such manner as if a warrant of distress had been issued and *nulla bona* returned thereon; and it shall be lawful for such justice to issue his or their warrant for committing such offender or defendant to the common jail for any term not exceeding three calendar months, unless the sum adjudged and costs be sooner paid; provided always the amount of costs and expenses shall be specified in such warrant of commitment.

By § 3, in any case any offender committed for default of payment of such penalty or forfeiture, together with reasonable costs and charges, shall during his imprisonment pay to the governor or keeper of the prison the amount of such penalty and costs, such governor or keeper shall discharge such offender from custody.

By § 4, the justices are empowered, on the desire or consent in writing of any offender, to withhold the warrant for distress for any penalty or forfeiture, and to commit the offender, in default of payment, for such time as in the said acts respectively directed.

(As to the office of justice of peace in and near the metropolis, see 6 G. 4, c. 21.

As to the power of justices of the peace to borrow money on mortgage of the county rates, see 6 G. 4, c. 40.)

By the 7 & 8 G. 4, c. 27, the 1 G. 4, c. 56, respecting malicious trespasses, (*antè*, p. 406,) is wholly repealed.

And by Sir Robert Peel's act, the 7 & 8 G. 4, c. 30, intituled *An act for consolidating and amending the laws in England relative to malicious injuries to property*, § 19, it is "enacted, that if any person shall unlawfully and maliciously cut, break, bark, or root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once or twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing elsewhere than in any of the situations herein-before mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and being convicted thereof shall be liable to any of the punishments the court may award for the felony herein-before last mentioned."

And by § 20, it is "enacted, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being con-

victed before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall, for such second offence, be committed to the common jail, or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award for the felony herein-before last mentioned."

And by § 21, it is "enacted, that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common jail or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof shall be liable to any of the punishments which the court may award for the felony herein-before last mentioned."

And by § 22, it is "enacted, that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed, not being a garden, orchard, or nursery-ground, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common jail or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding one calendar month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default thereof together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common jail or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

And by § 23, it is "enacted, that if any person shall unlawfully and maliciously cut, break, throw down, or in any wise destroy any fence of any

description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common jail or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

And by § 24, it is "enacted, that if any person shall wilfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is herein-before provided, every such person being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds, which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money together with costs, if ordered, shall not be paid, either immediately after the conviction, or within such period as the justice shall at the time of conviction appoint, the justice may commit the offender to the common jail or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any time not exceeding two calendar months, unless such sum and costs be sooner paid; provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this act."

And by § 25, it is "enacted, that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."||

[(F) Their Indemnity and Protection by the Law in the right Execution of their Office; and their Punishment for the Omission of it.

A JUSTICE of the peace is strongly protected by the law in the just execution of his office. He is not to be slandered or abused; if he is slandered in his presence he may commit or indict the party: if in his absence, he is entitled to redress himself by action.

(F) Their Indemnity in Execution of their Office, &c.

Aston v. Blagrave, 1 Str. 617 ; Kent v. Pocock, 2 Str. 1168 ; R. v. Revel, 1 Str. 420 ; R. v. Pocock, 2 Str. 1157. βIn general, whenever the officer has acted honestly although mistakingly, he is entitled to notice of action. Jones v. Hughes, 5 S. & R. 301.*g*

He is not punishable at the suit of the party, but only at the suit of the king, for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other; for, regularly, no man is liable to an action for what he doth as judge: but in cases wherein he proceeds ministerially, rather than judicially, if he acts corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king. But he must have acted *corruptly* to subject himself to punishment by information: for though he should even act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or intention, an information will not be granted against him, but the party complaining will be left to his ordinary legal remedy, by action or indictment.

2 Hawk. P. C. c. 13, § 20; R. v. Young, 1 Burr. 556: R. v. Cox, 2 Burr. 785 ; R. v. Palmer, 2 Burr. 1162; R. v. Jackson, 1 T. R. 653. ‖ The court refused to grant an information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk, the conviction returned being warranted by the facts. Lord Kenyon commended the magistrate in this case, and observed, that it was a matter of constant experience for magistrates to take minutes of their proceedings without attending to the precise form of them at the time when they pronounced their judgment, to serve as memoranda for them to draw up a more formal statement of them afterwards to be returned to the sessions, and that it was by no means unusual to draw up the conviction in point of form after the penalty had been levied under the judgment; nor was there any legal objection to this method, provided the facts would warrant them in stating what they did. R. v. Barker, 1 East, 186; Massey v. Johnson, 12 East, 76, S. P.‖

Nor will the court grant an information against him for an improper conviction, unless the party complaining make a full exculpatory affidavit.

R. v. Webster, 3 T. R. 388. βAn information was refused against a justice of the peace, on the charge of extortion and oppression, where he received fees, which, though illegal, were usual, and it did not appear that there was a disposition to oppress. Respublica v. Hannum, 1 Yeates, 71.*g*

Nor shall he be liable to be punished both ways, that is, both criminally and civilly; but before the court will grant an information, they will require the party to relinquish his civil action, if any such is commenced. And even in the case of an indictment, and though the indictment is actually found, yet, the attorney-general (on application made to him) will grant a *nolle prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time.

R. v. Fielding, 2 Burr. 719. ‖ Trespass lies not against magistrates acting on a complaint made to them on oath, by the terms of which they have jurisdiction, though the real facts of the case might not support such complaint, if such facts be not laid before them at the time by the party complained against, having due notice of the complaint, and being properly summoned to attend. Lowther v. Earl of Radnor, 8 East, 113.‖ β It seems that an action does not lie against a justice of the peace for demanding excessive bail on a criminal charge. Evans v. Foster, Adams, 374.*g*

He is enabled to plead the general issue in any action that may be brought against him for any thing done by virtue of his office, and to give the special matter in evidence; and if he has a verdict in his favour, is entitled to double costs. And such action shall not be laid but in the county where the fact was committed.

7 Ja. 1, c. 5 ; 21 Ja. 1, c. 12.

(F) Their Indemnity in Execution of their Office, &c.

And by stat. 24 G. 2, c. 44, it is enacted, that no writ shall be sued out against, or copy of any process at the suit of a subject shall be served on any justice for any thing done by him in the execution of his office; until notice (*a*) in writing shall have been given to him or left at his usual place of abode by the attorney for the party, one calendar month before the suing out, (*b*) or serving the same; in which shall be clearly and explicitly contained (*c*) the cause of action which the party hath or claimeth to have against the justice, and on the back of which shall be endorsed the attorney's name (*d*) and place (*e*) of abode; for which he shall be entitled to a fee of 20*s*. and no more. And unless it is proved on the trial that such notice was given, the justice shall have a verdict and costs. Nor shall any evidence be permitted to be given by the plaintiff on the trial, of any cause of action, except such as is contained in the notice. And the action must be commenced within six calendar months after the act committed.(*g*)

‖ (*a*) A magistrate acting alone in a case where he ought to have the concurrence of another magistrate, is still entitled to notice, under this statute; for the subject-matter was within his jurisdiction, and he intended to act as a magistrate at the time, however mistakingly. The very object of the legislature in requiring the notice was to enable the magistrate to tender amends as for the wrong done, contemplating him as a wrong-doer. Weller v. Toke, 9 East, 364.‖ The lord of a manor, who is also a justice of the peace, is entitled under this statute to notice of an action brought against him for taking away a gun in the house of an unqualified person; for as the subject-matter is within his jurisdiction, he will be taken to have acted as a magistrate. Bridges v. Evelyn, 1 H. Bl. 114. (*b*) The month begins with the day on which the notice is served; for where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning. Castle v. Burditt, 3 T. R. 623, (*c*) ‖ The notice must state as well the writ or process intended to be sued out, as the cause of action; else the defendant will be entitled to a verdict. It is not enough for it to state that the plaintiff intends to sue the justice for unlawful imprisonment; it must also add the precise writ or process intended to be sued out. Lovelace v. Curry, 7 T. R. 631. And where the plaintiff gave notice that he intended to bring an *action on the case* against the justice for false imprisonment and assault, and afterwards brought an action of *trespass* and false imprisonment, Yeates, J., held the notice insufficient, as tending to mislead the justice, who might know that an action on the case was improper, and the plaintiff might be nonsuited on it, and therefore omit to tender amends. Strickland v. Ward, Winchester Sum. Ass. 1767; 7 T. R. 631, notes. (*d*) The initial of the attorney's Christian name is sufficient. Mayhew v. Locke, 7 Taunt. 63; 2 Marsh. 377, S. C. (*e*) A notice written by the attorney, and signed by him thus: "Given under my hand, at Durham," was holden to be insufficient, because it did not expressly state that Durham was his place of residence. Taylor v. Fenwick, cited by Lawrence, J., 7 T. R. 635. But the name, with the addition of the place, is sufficiently descriptive of the attorney's place of residence. Osborn v. Gough, 3 Bos. & Pull. 550.‖ (*g*) If a man be imprisoned by a justice's warrant on the first day of January, and kept in prison until the first day of February, he will be in time if he bring his action within six months after the first day of February; for the whole imprisonment is one entire day. Pickersgill v. Palmer, Bull. N. P. 24. ‖ In trespass against magistrates for an act done by them *ex officio*, the plaintiff must show, at *nisi prius*, that he proceeded on a writ sued out within six months after notice to them of the action, although there be a continuing cause of action; and therefore he must show a return and continuance of the first writ, if the second be out of the time fixed by the notice. Weston v. Fournier, 15 East, 491.‖

‖ § 2. The justice may at any time within one calendar month after such notice given tender amends to the party complaining, or to his agent or attorney; and in case the same is not accepted, he may plead such tender in bar to the action, together with the plea of not guilty, and any other plea with leave of the court; and if upon issue joined thereon the jury shall find the amends so tendered to have been sufficient, they shall

find a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or shall discontinue, or if judgment be given for the defendant upon demurrer, the justice shall be entitled to the like costs as if he had pleaded the general issue only. And if upon the issue so joined the jury shall find that no amends, or not sufficient, were tendered, and also against the defendant on such other plea or pleas, they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he shall recover with his costs of suit. § 4. And in case the justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action brought, he may by leave of the court before(*a*) issue joined pay into court such sum of money as he shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given, as in other actions where the defendant is allowed to pay money into court.

(*a*) This may be done *after* issue joined by moving to withdraw that issue, pay money into court, and plead *de novo*. Devaynes v. Boys, 2 Marsh. 356.‖

§ 7. But, where the plaintiff in such action shall obtain a verdict, and the judge shall in open court certify on the back of the record, that the injury for which such action was brought, was wilfully and maliciously committed, the plaintiff shall have double costs.

‖ By 43 G. 3, c. 141, reciting "that it is expedient that justices of the peace in Great Britain and Ireland respectively, who by virtue of divers acts of parliament in force in the United Kingdom are authorized and required to convict persons of sundry offences in a summary way, should be rendered more safe in the execution of such their duty; it is enacted, that in all actions whatsoever, which shall be brought against any justice or justices of the peace in the United Kingdom of Great Britain and Ireland for or on account of any conviction by him or them had or made under or by virtue of any act or acts of parliament in force in the said United Kingdom, or for or by reason of any act, matter, or thing whatsoever done or commanded to be done by such justice or justices for the levying of any penalty, apprehending of any party, or for or about the carrying of any such conviction into effect, in case such conviction shall have been quashed; the plaintiff or plaintiffs in such action or actions, besides the value and amount of the penalty or penalties which may have been levied upon the said plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to recover any more or greater damages than the sum of two-pence, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, and which shall be in an action on the case only, that such acts were done maliciously and without any reasonable and probable cause."

§ 2. "And that such plaintiff shall not be entitled to recover against such justice any penalty, which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence."

The true construction of this act is, to confine the protection it gives to magistrates to cases where there has been in fact a *conviction*. They were already protected in an action of *trespass* by a subsisting conviction good upon the face of it; and this act meant to protect them still further to a cer-

tain extent in a case where they were left unprotected by the *quashing* of a conviction.

Massey v. Johnson, 12 East, 71; Gray v. Cookson, 16 East, 21. It would appear from the case of Gray v. Cookson, that if the conviction be good upon the face of it, the production and proof of it at the trial will be a justification in a collateral proceeding against the magistrate, as well in respect of such facts therein stated as are necessary to give him jurisdiction, as upon the merits of the case; that evidence *aliundè* is not admissible to prove that the conclusion drawn by him is erroneous. And if the magistrate be warranted in taking cognisance of the charge, and do in fact convict, the conviction, however irregularly drawn up, will protect him in an action of trespass against him by the party convicted. Massey v. Johnson, *ubi supra;* Strickland v. Ward, 7 T. R. 633, 634. In the case of Crepps v. Durden, Cowp. 640, it appeared on the face of the convictions that the magistrate had no jurisdiction.

As the statute of 43 G. 3 requires that the plaintiff in an action for a malicious conviction shall expressly allege in his declaration that the acts were done maliciously and without any reasonable and probable cause, it, of course, imposes upon him the onus of proving that allegation; for which purpose it is not sufficient for him to show that he was innocent of the offence of which he was convicted, the question in this case not depending upon his guilt or innocence, but upon what passed before the magistrate; it must appear from the evidence given before him that there was a want of all probable cause.

Burley v. Bethune, 1 Marsh. 220. See Lowther v. Earl of Radnor, 8 East, 113, determined upon the same principle.‖

If a justice will not, on complaint to him made, execute his office; or, if he misbehave in his office; the party grieved may move the Court of King's Bench for an information, and afterwards may apply to the Court of Chancery to put him out of the commission.

Crom. 7; 2 Atk. 2. β Being intoxicated with spirituous liquors, while in the discharge of the official duties, is a misbehaviour for which the justice ought to be removed from office. Commonwealth v. Alexander, 4 H. & M. 522.*g*

‖ Any fraud or misconduct imputed to magistrates in proceeding, notwithstanding the issuing of a *certiorari*, may be a ground for a criminal proceeding against them; and Lord Kenyon said, he believed there were instances in which a criminal information had been granted against magistrates acting in sessions. But these must have been instances of manifest oppression and gross abuse of power. For generally, the justices are not punishable for what they do in sessions.

7 T. R. 374; R. v. Mather, 2 Barnardist. 249; R. v. Eyres, Ibid. 250; Staunf. 173; 12 Co. 23.‖ β A justice is not liable to punishment on an indictment unless he have acted corruptly or oppressively. State v. Johnson, 2 Bay, 385. See Lining v. Bentham, 2 Bay, 1; Gregory v. Brown, 4 Bibb, 28; People v. Coon, 15 Wend. 277; People v. Whaley, 6 Cowen, 661.*g*

β A refusal by a justice of the peace, to deliver a copy of his proceedings, on demand, when he is required by an act of assembly to do, is a misdemeanor for which he may be indicted.

Wilson v. The Commonwealth, 10 S. & R. 373.*g*

‖ On a motion for an information against four persons, who were churchwardens and overseers of Seaford, and also the only justices of the peace for that borough, for refusing to put a substantial householder on the poor's rate, (which is a necessary requisite towards giving a vote for members of parliament,) and, upon appeal, refusing to amend the rate, or give relief in sessions; the court said, that as these persons were acting in a court of record with powers intrusted to them by the consti-

tution, it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information; and therefore refused to grant a rule to show cause.

R. v. Justices of Seaford, 1 Bl. Rep. 432.‖

A magistrate forfeits the protection of the law in the execution of his office, by beginning a breach of the peace himself.

R. v. Symonds, Ca. temp. Hardw. 240.

‖In the 4th of H. 7, a law was made, at this day not repealed, monitory and minatory, as Lord Bacon says, towards justices of peace, that they should duly execute their office, inviting complaints against them, first to their fellow-justices, then to the justices of assize, and then to the king or chancellor; and that a proclamation which the king had published of that tenor, should be read in open sessions four times a-year to keep them awake.

4 H. 7, c. 12, Hist. of King H. 7.‖

β An information was granted against a justice of the peace for not actively assisting in suppressing a riot.

Respublica v. Montgomery, 1 Yeates, 419.

An action lies against a justice of the peace for deceitfully concealing the fact of his rendering judgment against a defendant, and thereby preventing his appeal.

Neighbour v. Tremoner, 1 Har. 55.

When a justice has no jurisdiction whatever, and he undertakes to act, his acts are *coram non judice*, and he is liable in trespass.

Buttler v. Potter, 17 Johns. 145. See Bigelow v. Stearns, 19 Johns. 39; Horton v. Auchmoody, 7 Wend. 200.

Where a magistrate, meeting constables having in custody the plaintiff, on a charge of drunkenness, ordered him to be taken back to the lock-up house, and he would see him the next day, and the plaintiff was kept confined till then, when he was fined by the magistrate, and he aftewards brought an action of trespass against the magistrate, it was held that the action could be maintained, because the magistrate ought to have gone into the case at once or not interfered, and let them have gone to another magistrate, that he had no right to imprison the plaintiff without hearing the charge.

Edwards v. Ferris, 7 C. & P. 542.

A justice committed the plaintiff "for refusing to give evidence before him, touching a certain riot and disturbance," without showing that there had been a person charged before the justice, and that the plaintiff was apprized of the existence of the charge, with respect to which he was required to be examined as a witness: held that the warrant of commitment was no justification of the magistrate in an action of trespass.

Cropper v. Horton, 8 D. & R. 166.

When the warrant of apprehension for an assault omitted to state any information on oath, and the examination of the complainant was not taken in the presence of the justice, but by his clerk, held not a justification, it being a matter for his discretion, and that the justice was liable in trespass.

Candle v. Seymour, 1 Gale & D. 454.ℊ

‖When a criminal information is asked against a justice, the question for the court is, not whether the act is strictly right or not, but whether it pro-

ceded from an unjust oppression or corrupt motive, or from mistake or error only. In the latter case the court will not grant the rule.

Rex v. Borron, 3 Barn. & A. 432.

Where the facts took place twelve months before the application to the court, they refused to grant the information, although the prosecutor stated that the facts had not come to his knowledge till very shortly before the application. The information may be moved for in the second term after the offence, there being no intervening assizes, but not so late in the second term as to preclude the magistrate showing cause in that term.

Rex v. Bishop, 5 Barn. & A. 612; Rex v. Harris, 13 East, 270; Rex v. Marshall, 13 East, 322.

Where a justice maliciously grants a warrant, without any information, for a charge of felony, the remedy is trespass for false imprisonment, and not case.

Morgan v. Hughes, 2 Term R. 225; and see 10 Barn. & C. 28.

In an action against a justice, a record of conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts stated in it; for he is acting as a judge of record, and his record is not traversable.

Brittain v. Kinnaird, 1 Bro. & B. 432; 4 Moo. 50; Basten v. Carew, 3 Barn. & C. 649.

But he would be liable to punishment if he corruptly made the record differ from the real facts.

3 Barn. & C. 657.

If the magistrate commit for one offence, and the conviction drawn up is for another, the conviction affords no justification of the imprisonment.

Rogers v. Jones, 3 Barn. & C. 409. β See Morgan v. Brown, 6 Nev. & M. 57; Daniell v. Phillipps, 1 C. M. & R. 612; 5 Tyr. 293.*g*

And if the warrant of commitment do not show an offence over which the magistrate has jurisdiction, an action lies for the commitment, although there be a previous regular conviction.

Wickes v. Clutterbuck, 2 Bing. R. 483. β See Rex v. Elmy, 3 Nev. & M. 733; 1 Adol. & Ellis, 843.*g*

In an action against a magistrate for malicious conviction, it is not enough for plaintiff to show that he was innocent of the offence, but he must also prove, from what passed before the magistrate, that there was a want of probable cause.

Burley v. Bethune, 1 Marsh. 220; 5 Taunt. 580.

An action of trespass does not lie against a justice for any thing done in discharge of his duty, unless he is made acquainted with all the circumstances under which he is called on to act.

Pike v. Carter, 3 Bing. R. 78.

In an action against a justice, he may, after issue joined, and even after notice of trial given, move to withdraw the general issue, pay money into court, and plead *de novo*.

Devaynes v. Boys, 2 Marsh. R. 356; 5 Taunt. 33; Nestor v. Newcombe, 3 Barn. & C. 159.

In an action against a justice, the notice required by 24 G. 2, c. 44, was signed *T.* and *W. A. Williams*. The names of the attorneys were *Thomas Adams Williams*, and *William Adams Williams*. The notice was sufficient.

es v. Swift, 4 Barn. & C. 681.

(F) Their Indemnity in Execution of their Office, &c.

No notice is necessary in an action against a justice for a penalty for acting without proper qualification.

Wright v. Horton, Holt's Ca. 458.‖

β The abode of the plaintiff's attorney is sufficiently designated, in a notice to a justice of the peace of Washington county, to describe him as T. B., of Washington, that being intended in common parlance as the town of Washington.

Litle v. Toland, 6 Binn. 83.

A notice subscribed thus, "J. L., attorney for T. K., No. 79, So. 5th St.," is not a sufficient notice of the attorney's place of abode.

Bates v. Shaw, 13 S. & R. 420.

A notice signed by the plaintiff's attorney, and dated Wilkesbarre, but without an endorsement of his name, or any thing else to show he resided in Wilkesbarre, was held insufficient.

Slocum v. Perkins, 3 S. & R. 295.

A notice signed by the plaintiff, directed to the defendant, and endorsed "Notice to J. S., Esquire, Henry Reed, living in Poplar Lane, between 3d and 4th Streets." Held defective, in not stating that Henry Reed was the agent of the plaintiff, and there being nothing by which it might be inferred that he was his agent, having authority to receive amends.

Lake v. Shaw, 5 S. & R. 517.

In such a notice it is not requisite to specify either the kind of writ or process to be sued out, nor the kind of action intended to be brought; but the cause of action must be clearly described.

Mitchell v. Cuwgill, 4 Binn. 20; Litle v. Toland, 6 Binn. 84. See Miller v. Smith, 12 S. & R. 145; Lowrie v. Verner, 3 Watts, 317; Jewel v. Howe, 3 Watts, 144; Hansell v. Sproul, 7 Watts, 297; Coates v. Wallace, 17 S. & R. 75.

In general, when the justice has acted honestly but mistakingly, he is entitled to notice of the cause of action, and may tender amends. (*a*) But he is not entitled to notice, when the acts done by him are a violation of the constitution, or when he has no jurisdiction.(*b*)

(*a*) Jones v. Hughes, 5 S. & R. 301. (*b*) Johnson v. Tomkins, 1 Bald. 571.

When the plaintiff gives the notice in person, it is not requisite that he endorse the name of an attorney.

Byerly v. Vankirk, 5 Watts, 370. In such case the abode of the plaintiff must be specified. Lake v. Shaw, 5 S. & R. 518.

The notice of action is not waived by the mere act of the party; the mere acknowledgment of the matter in respect of which the action was threatened, and tendering amends, held not to dispense with the proof of notice.

Martins v. Uppcher, 1 Dowl. N. S. 555.

Where a magistrate seized the plaintiff's goods, alleging, at the time, that they were stolen; held, that having acted *bona fide*, and intending to act in the execution of his duty, he was entitled to notice of action.

Wedge v. Berkeley, 1 Nev. & P. 665.*g*

‖ In trespass for false imprisonment against a magistrate, it appeared that A B was discharged from prison on the 14th of December, and the writ issued on the 14th of June; it was held that the action was commenced in time.

Hardy v. Ryle, 9 Barn. & C. 603.

The summary jurisdiction given to justices by the 4 G. 4, c. 34, § 3,

extends only to cases where the relation of master and servant exists; and therefore where A had contracted with B to build a wall for a certain price, within a certain time, and having performed part of the work refused to complete it, this was held not to be within the statute; and a magistrate who acted on the complaint of B, and convicted and committed to prison A, was held liable to an action for false imprisonment.

Lancaster v. Greaves, 9 Barn. & C. 628.‖

LEASES AND TERMS FOR YEARS.

A LEASE for years is a contract between lessor and lessee, for the possession and profits of lands, &c., on the one side, and a recompense by rent, or other consideration, on the other.

1 T. R. 598, 599. β A lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent, payable either in money or other things. The United States v. Gratiot et al., 14 Pet. 526.ϑ ‖It is essential to a lease, that there be reserved a reversion to the grantor; for if the whole estate and interest which the grantor hath be parted with, the instrument in that case is not a lease, but an assignment. The very name of lease imports a separation, a detachment of a part from the whole. Shepp. Touchst. 265. If the instrument comprise the whole of the grantor's estate, it is an assignment, and not an under-lease, though there be a power of re-entry, or reservation of rent. Palmer v. Edwards, Dougl. 187; 2 Prest. Conveyanc. 124.‖

This is esteemed in law a middle kind of interest between an estate for life and a tenancy at will: for those who held large districts and tracts of lands, being unacquainted with the arts of husbandry and tillage, found it to their interest to lease out their demesnes, which for want of care and cultivation lay waste, and afforded them little or no profit. And this way of letting for years was thought best to answer the design and intentions of the lord, as well as the expectations of the tenant; for if they had let them for life, this had given the tenants too great a power over the lord, because then they would have had a property in the freehold, and by suffering disseisins, or feigned recoveries to be had against themselves, might have shaken or endangered the inheritance of the owner; and on the other side, if they had leased their land only at will, few would have been willing to bestow any great pains or industry upon so precarious a possession, which the arbitrary will and pleasure of a peevish lord might have defeated.

Spelm. Rem. 2.

Originally, leases for years were but of little regard, the tenant having only *utile*, not *directum dominium*, and being said *tenere nomine alieno:* and as he had only the perception of the profits, whoever recovered the freehold reduced likewise the possession, whether such recovery were true or feigned; and the lessee had no other remedy but an action of covenant against the lessor; and this, at least, was thought a just construction, that he who had divested himself of the profits of his lands for a time, by giving them to another, should be obliged to maintain that gift, or be liable to make satisfaction if he did not; and this was the more reasonable, be-

cause the lessee was equally bound to answer and make good the rent during the term; and if he did not, the law allowed the lessor to maintain an action of covenant as well as of debt against him, for withholding thereof. And as it made this construction for the lessor upon the words *yielding* and *paying*,(*a*) which were no express covenant in themselves, it was but reasonable it should make the like construction for the lessee upon the word *dimisit*, which in itself no more imported an express covenant on his part: but by making this construction mutual, the courts did justice to both; and by making it all, they plainly showed their opinions of the lease to be no other than a contract or agreement between the parties, and not such an act as transferred any property to the lessee: and this is one reason why leases for years are considered as chattels, and go to (*b*) executors.

(*a*) Vide tit. *Covenant*, and Salk. 137, pl. 1. (*b*) Therefore, if a lease be made to a bishop, abbot, parson, or any other sole corporation, and his successors, for such a number of years, yet it shall go to the executors or administrators of the lessee, and not to his successors, because a term for years being looked upon as a chattel, the executors or administrators are the only persons the law allows to succeed thereto; and this succession to the chattel cannot be altered or controlled by any limitation of the party: but yet in such case it seems, that the executors or administrators of the lessee shall hold it in the right of and as trustees, for the successors; for the book says, they shall have it in *auter droit*. Co. Lit. 9 a, 46 b, 90 a.—But this rule, as to the succession of chattels, hath two exceptions: 1. In case of the king, who by his prerogative may take any chattels in succession, and, consequently, a lease made to him and his successors for years is good, and shall go accordingly, and not to his executors or administrators. Co. Lit. 90 a; 11 Co. 92 a.——The second exception is in case of the chamberlain of London, who, by custom of the city, confirmed by divers acts of parliament, may take chattels in succession for the benefit of orphans. But *quære*, if this custom extends to leases for years, for the books only mention recognisances, obligations, &c., which are given or entered into to the chamberlain and his successors, by way of security for orphans' portions; *quære*, therefore, if a lease may be made to the chamberlain and his successors for years. Cro. Eliz. 464; 4 Inst. 249; 4 Co. 65, Fulwood's case.

Another reason was, because at first these leases were made but for a small number of years, (for my Lord Coke tells us, that by the ancient law of England,(*c*) no man could have made a lease for above forty years at the most,) and the reason thereof seems to be, because they were only made to serve the occasions and exigencies of the lord in cultivating and improving his demesnes, not to borrow money on or raise portions for daughters, or such other uses as are now made thereof; therefore there was no need to extend them to any great length of time, since they might be renewed as often as occasion required. Besides, the lessees, if they were evicted, being only to recover damages, it would have been fruitless to prolong leases for the term of 1000 years, when the persons who are to possess under such leases had no remedy for their damages but by recourse to the representatives of the original lessor.

Co. Lit. 45 b; Mirror, c. 2, § 27; Vent. 58. ‖(*c*) This law against leases for more than forty years, if it ever existed, was, as Mr. J. Blackstone observes, soon antiquated; for we find in Madox's Collection of ancient Instruments, some leases which considerably exceed that period; and long terms for three hundred years or a thousand were certainly in use in the time of E. 3, and probably of E. 1, 2 Comm. 142.‖

Also, another reason might be, because these leases for years were under the power of the freeholder to destroy by a recovery; for a person coming in by the recovery was supposed to come in by title paramount, and so was not bound or obliged by them, and by consequence, few could be willing to take leases for any longer term, which they might so easily be defeated of.

Vide title *Fines and Recoveries*.

But, though in the reign of H. 7, it was resolved, that the lessees should not only recover damages as a recompense for the possession lost, but should also recover the possession itself; and the statute 21 H. 8, c. 15, gives the termor power to falsify all manner of recoveries had against the tenant of the freehold, upon feigned and untrue titles; from whence men began to limit long leases, because by such purchases they escaped the wardship, relief, and other burdens that were annexed to the ancient tenures; yet no alteration was made in the succession to them, the law having been formerly settled as to that point; and if they had not carried the succession in the manner they formerly did, they had lost the end of such limitation.

Bro. tit. *Leases*, 26; F. N. B. 198, 220; Vaugh. 127; 4 Co. 80; Lev. 46; 2 Mod. 18.

And though at this day terms for years are multiplied to a much longer duration than they were formerly, and there is now ample remedy to recover the term itself, yet the succession continues the same; for besides the reasons already given, it would be inconvenient to have had one rule of property for short terms, and another for those that were longer, being all of the same nature, and still no more than leases for years; besides the difficulty of fixing the just bounds to any precise determinate number of years, since one or two years, more or less, would have made very little difference in reason, and long or short are only terms of comparison; as a lease for forty years is long with respect to one of eight or ten years, and yet short with respect to another of a hundred years; therefore that there might be an uniformity in the law, all leases for years are holden to be of less value than estates for life, as being originally of much shorter duration, and also because they were under the power of the tenant of the freehold to destroy, and therefore are considered only as chattels, and cast upon the executors.

[Long terms, as for 2000 years, are considered (at least after part of the time has elapsed) not as leases, but as terms to attend the inheritance. Cowp. 597.]

We shall consider this head under the following divisions:

(A) Of what Things Leases may be made for Years.

(B) Of the Persons by whom Leases may be made: And herein, first, of Leases by Infants.

(C) Of Leases made by Husband and Wife: And herein,

1. *Of Leases made by Husband and Wife by the Common Law.*
2. *Of Leases made by them pursuant to the Statute of* 32 *H.* 8, *cap.* 28.

(D) Of Leases by Tenant in Tail: And herein,

1. *What Leases Tenant in Tail might have made by the Common Law.*
2. *What Leases Tenant in Tail may now make to bind his Issue, since the* 32 *H.* 8, *cap.* 28.
3. *When and in what Cases the Issue in Tail, or Strangers shall be bound by voidable Leases made by Tenant in Tail.*

(E) Of Leases for Lives or Years by Ecclesiastical Persons: And herein,

1. *What Leases they might have made by the Common Law, and of the several enabling and disabling Statutes, with some general Observations on them.*
2. *Of the Rules to be observed, and Qualifications requisite to the Perfection of such Leases: And herein,*

Rule 1. Where an Indenture or Deed is necessary.

Rule 2. When such Leases are to begin: and herein,

1. *When such Leases as have no Date at all, or a void or impossible Date, are to begin.*

Leases and Terms for Years.

2. *Such Leases as have a good Date, and are delivered on the same day; in what Cases the Day of the Date or Delivery is to be taken inclusive, and in what Cases exclusive.*

3. *Such Leases as have a good Date, but are not delivered till a Week or Month, &c., after, when they are to begin, and how the Declaration on such Leases is to be framed.*

Rule 3. Within what Time the old Lease is to be surrendered; and herein of concurrent Leases.

Rule 4. That such Leases are not to exceed three Lives, or twenty-one Years.

Rule 5. Of what Things Leases may be made to bind the Successor.

Rule 6. What shall be said a usual Letting to Farm upon the several Statutes, and by what Persons.

Rule 7. What Rent is to be reserved: and herein,

1. *That there must be a Rent reserved.*

2. *That this Rent must continue due, and be payable to the Lessors and their Successors.*

3. *That such Rent must be the same, or more in Quantity than hath been reserved within twenty Years next before such Lease made: And herein,*

1. *What shall be said to be the ancient Rent, where Variety of Rents have been reserved, or something formerly reserved now omitted or varied.*

2. *In what Manner such Reservation is to be made.*

3. *Where the Addition of more Land, with or without the Addition of more Rent, shall avoid such Leases.*

4. *Where a Reservation of the whole Rent, or only* pro Rata *on a Lease of Part, shall be good.*

Rule 8. That such Leases must not be made without impeachment of Waste.

(F) Of Leases by Parsons, Vicars, and others, with respect to other Qualifications.

(G) Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons: And herein,

1. *Where Confirmation is necessary either in respect of the Leases or Estates made, or of the Persons making the same.*

2. *What Persons are to confirm such Leases or Estates, and in what Manner.*

3. *What Estates they who make such Confirmation are to have.*

4. *At what Time such Confirmation is to be made.*

5. *How far a Regard is to be had to the true naming of the Corporation or Persons who do confirm.*

(H) Of void or voidable Leases by Ecclesiastical Persons: And herein,

1. *Against whom Leases not pursuant to the Statutes, or otherwise defective, are void or only voidable.*

2. *By what Means and in what Cases such voidable Leases may be made good.*

3. *The Manner of avoiding such Leases as are only voidable.*

(I) Of Leases made by those who have but a particular Estate or Interest in the Lands leased: And herein,

1. *Of Leases made by Tenant in Dower or Curtesy.*

2. *Of Leases made by Tenant for Life.*

3. *Of derivative Leases, or by one who is but a Lessee for Years himself.*

4. *Of Leases made by a Disseisor or Disseisee.*

5. *Of Leases made by Joint-tenants or Tenants in Common.*

6. *Of Leases made by Copyholders.*

7. *Of Leases made by Executors or Administrators.*

8. *Of Leases made by a Bailiff of a Manor.*

9. *Of Leases made by a Guardian.*

10. *Of Leases made pursuant to Authority.*

11. *Of Leases made pursuant to Powers in private Conveyances and Settlements.*

(A) Of what Things Leases may be made for Years.
(K) By what Form of Words Leases may be made.
(L) What Certainty is requisite to Leases for Years as to their Beginning, Continuance, and Ending: And herein,
1. *With regard to the Date of the Lease.*
2. *With regard to other Circumstances taken notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.*
3. *The Certainty of Leases for Years as to their Continuance.*
4. *The Certainty of Leases for Years as to their Duration and Ending.*
(M) In what Cases, and to what Respects an Entry by the Lessee is requisite to the Perfection of his Lease.
(N) Leases for Years, when to take Effect as a Reversion, when as a future Interest, and when neither the one nor the other.
(O) Leases for Years by Estoppel, how far and against whom such Leases are good.
(P) Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and where an Entry before the Term begun is a Disseisin.
(Q) How far, and by what Means, Leases for Years in Trust to attend an Inheritance may be barred or destroyed.
(R) Leases for Years, when merged by Union with the Freehold or Fee.
(S) Of Surrenders of Leases for Years: And herein,
1. *Of Surrenders in Fact or Express: And here again,*
1. By what Words such Surrender may be made.
2. Upon what Estate such Surrender may operate.
2. *Of Surrenders in Law, or implied Surrenders: And herein,*
1. With regard to Leases in Possession.
2. With regard to Leases *in Futuro.*
3. With regard to the Thing itself so surrendered.
(T) Leases, when determined by cancelling the Deed.
(T 2) When forfeited.
(U) Of the Renewal of Leases.
ß (V) Miscellaneous cases.ℊ

(A) Of what Things Leases may be made for Years.

After such time as leases for years began to be looked upon as fixed and permanent interests, and that the lessees were sufficiently provided to defend themselves, and their possessions, against the acts and encroachments as well of the lessor as of strangers, men found it their interest to improve and encourage this sort of property, and therefore extended it to all sorts of interests and possessions whatsoever, being led thereto by that known rule, that whatsoever may be granted or parted with for ever, may be granted or parted with for a time; and therefore not only lands and houses have been let for years, but also goods and chattels, though the interest of the lessee therein differs from the interest he hath in lands or houses so let for years: for if one lease for years a stock of live cattle, such lease is good, and the lessee hath only the use and profits of them during the term; but yet the lessor hath not any reversion in them to grant over to another, either during the term or after, till the lessee hath re-delivered them to him, as he would have of lands in case of such lease for years; for the lessor hath only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them again after the term; and during the term he hath nothing to do with them, and, consequently, of such

as die the property rests absolutely in the lessee: so, whether they live or die, yet all the young ones coming of them, as lambs, calves, &c., belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing. And therefore this differs from a lease of other dead goods and chattels; for there, if any thing be added for the repairing, mending, or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal. Neither is the succession of young ones, in case any of the old ones die, to be resembled to a corporation aggregate, whereof when any die, those that succeed shall be said part of the same corporation, for the corporation, in its public capacity, never dies; but this being a lease of such and such individual cattle, when any of them die, the possibility of reverting property, which was left in the lessor, is determined and at an end. But the lessee in such case cannot kill, destroy, sell, or give them away, during the term, without being subject to an action of trespass, as it should seem. But in case of a lease of a house, together with goods, it is usual to make a schedule thereof, and affix it to the lease, and to have a covenant from the lessee to re-deliver them at the end of the term; and without such covenant the lessor could have no other remedy but trover or detinue for them after the lease ended.

Godb. 112; Leon. 42; Owen, 139; 5 Co. 16, 17; Dyer, 56 a; 110 a; 212 b; Bro. tit. *Leases*, 23; 2 Buls. 7; Lit. § 71; Co. Lit. 57 a.

If one hath a corody for life, he may let it to another, or to the grantor himself. So may the grantee of house-bote, or hay-bote. But in case such lease be to the lessor himself, rendering rent, he can only have them by way of retainer, being to arise out of his own provision, or his own land.

Bro. tit. *Leases*, 40.

But as to lands or other things of inheritance, as they may be granted or departed with for ever, so they may for a time, and, consequently, may be leased for years in all cases where no inconvenience or injury to the public is like to ensue; for then men's private interests must give way to the public, and what might otherwise in its own nature be good and allowable, must upon that account be disallowed and stand condemned. Wherefore it having been settled, that all leases for years were but chattels, and as such should go to executors or administrators, the first case wherein we find any objection to a lease for years is, that of the office of marshal of the King's Bench prison; for that being an office of great trust, concerning the administration of justice in the keeping of prisoners, if it should be granted for years it might be injurious to the public, by being in suspense till probate of the will or administration taken out; and if the officer should die indebted, so that none would prove his will, or take out administration, then there would be no officer at all, and executors or administrators would be in by act of law, without allowance of the court. Also, it might be a question, if such office should not be forfeited by outlawry, or be assets in the executor's hands; and many other inconveniencies would follow, if such grant for years were allowed. For the same reason it was holden likewise, that the offices of *custos brevium*, chirographer, clerk of the pipe, of the king's silver, or of the crown, remembrancer or chamberlain of the Exchequer, prothonotaries, and other officers in the several courts of justice, cannot be granted for years; and though the offices of sheriff and coroner were granted

for years, till restrained by 14 E. 3, c. 7, yet it was never debated what inconveniencies might ensue by allowing thereof. And these reasons held equally good against granting the office of warden of the Fleet, or any other (*a*) jailership.

Hard. 357; 9 Co. 97; Roll. Abr. 847; 2 Roll. Abr. 153; Sir George Reynold's case, Cro. Car. 587; Jon. 563; Hob. 153; 3 Mod. 145. (*a*) In 2 Cha. Ca. 70, it is said by my Lord Chancellor, that he thought the case of a jailership not being grantable for years too easily slipped over.

And although it hath been resolved, that the office of marshal of the King's Bench prison cannot be granted for years, yet it hath been holden, that a lease thereof for years during the life of the grantee is good; for hereby the danger of the office going to executors is avoided, which the book says is the sole reason why the office is not absolutely grantable for years.

6 Mod. 57, Sutton's case. [But see st. 8 & 9 W. 3, c. 27, and 27 G. 2, c. 17, with respect to this office.]

Also it appears, that the dean and chapter of Westminster made a lease for years of the Gatehouse prison, and the lessee had committed several offences which amount to a forfeiture, for which the office was seized; but no (*b*) objection made to its being let for years.

Raym. 216; 2 Lev. 71; 3 Keb. 32, The King v. Lady Broughton. (*b*) *Note:* There seems a difference between Sir George Reynold's case and this, because in Sir George Reynold's case the grant for years was from the crown, in whom all offices in relation to the administration of justice are originally and inherently lodged; and therefore, for the crown to grant out such office for years, may be liable to the objections before mentioned; but in this case the dean and chapter are the immediate grantees of the crown, and they have the office to them and their successors for ever in fee, and are perpetual jailers themselves, and answerable to the crown, notwithstanding any inferior lease to another; and therefore they always take security of such under-lessee for their own indemnity.

But such offices as do not concern the administration of justice, but only require skill and diligence, may be granted for years, because they may be executed by deputy, without any inconvenience to the public: Therefore, where a grant for years was made of the office of garbler of spices in London, it was adjudged to be a good grant, or at least a good appointment for years, within the intent of the statute 1 Jac. 1, c. 19.

Hard. 46, Jones and Clerk.

The office of printer was granted for years, 6 Car. 1, and held a good grant, being but an employment. So, the office of postmaster was granted to the Lord Stanhope for years, and held good.

Hard. 352.

The office of registrar of policies of assurance in London concerning merchants was granted by the king for years, and adjudged to be a good grant, because it did not concern the administration of justice in any court, but required only the skill of writing after a copy. So, the office of making and sealing *subpœnas* was granted for years, and allowed to be good. And there several precedents are cited of offices granted for years; as, first, offices in which the safety of the realm was concerned, as the office of the warden of a haven or port by H. 6, of gunpowder by 1 Car. 1, of making gunpowder by Car. 2. Also, offices concerning the trade of the realm have been granted for years; as 1 H. 7, of the exchange of money; 18 H. 8, of gauger; 17 Rich. 2, of aulnager, though a seal belongs to it, with which the officer is intrusted; of the letter-office, 3 Car. 1. Also, offices in courts

of justice have been granted for years; as the office of surveyor of the green wax, of the sixpenny writs in Chancery and *subpœnas*, of comptroller and customer, and of making out process in C. B. All these, and several others, have been granted for years; but no dispute having been made of the validity of them, how far some of them would hold at this day, may be a question.

Hard. 351, 354, 357; Dyer, 303; Hob. 146; 3 Keb. 80.

But, where one made a grant for years of the stewardship of a court-leet and court-baron, this was holden void as to the court-leet, being a judicial office, but good as to the court-baron, being only ministerial, and the suitors judges thereof; but the grant appearing afterwards to be for years determinable upon the death of the lessee, it was holden good for both, because there was no danger of its coming to executors or administrators.

2 Lev. 245; 2 Jon. 126, Howard and Wood.

One Mrs. Dennis was found by office to be an idiot *à nativitate;* the king grants the custody of body and estate to Sir Alexander Frazier, his executors and administrators, during the idiotcy; Sir Alexander dies, and then the king grants the custody to Mr. Prodgers; and whether he or the executrix of Sir Alexander had the better title was the question. It was said to be a trust in the king, and therefore not grantable to executors or administrators, and that if the grantee die intestate, there would be none to take care of the idiot. On the other side it was said, that the king had not only a trust, but an interest, and might have disposed of the profits to his own use, or have granted them over as he thought fit, in case of an idiot, though it was otherwise in case of a lunatic; and that being a chattel, it should naturally go to executors; and to this opinion my lord chancellor inclined, but directed the validity of the patent to be tried at law: and (*a*) in B. R. the grant to Sir Alexander was holden good; for the king has the same interest in an idiot that he had in his ward, which always went to the executor of his grantee, though it was otherwise in the case of a lunatic.

2 Chan. Ca., Prodgers v. Lady Frazier; Vern. 9, 137, S. C. (*a*) 3 Mod. 43; Vern. 9, 137, n. (1), 2d edit. S. C.

The office of park-keeper was granted for years, and no objection made to it; for this does not concern the administration of justice, but only requires diligence and care.

2 Roll. Rep. 274; Godb. 413.

Dignities or honours cannot be granted for years; as to be earl, duke, baron, &c., because then they must go to the executors, or administrators, whilst the estate that should support them would go to the heir, and so introduce confusion and absurdity.

Co. Lit. 16 b; 9 Co. 97 b.

By the 23 H. 6, c. 10, it is provided, "That no sheriff shall let to farm in any manner his county, nor any of his bailiwicks, hundreds, or wapentakes;" which proves that before this statute it was not (*b*) unusual to let them to farm.

(*b*) ‖ It was certainly not unusual; it was a general practice. To put an end to it in part, an act was passed in 2 E. 3, c. 12, to re-annex to the counties such hundreds and wapentakes as had been let by that king. To regulate it, the statute of 4 E. 3, c. 15, ordained, that the sheriffs should thenceforth let their hundreds and wapentakes for the old ferm, and not above; for they had before that time let them at so high a ferm, that the bailiffs could not levy it without doing extortion and duress to the people.‖

By the 12 Car. 2, c. 23, § 27, the lord treasurer, or commissioners of the

treasury for the time being have power to let to farm all or any the rates or duties of excise upon beer, ale, cider, and other liquors therein mentioned, so as the same exceed not the term of three years; without which clause the treasurer or commissioners of the treasury could not have made such lease, though perhaps the king himself might, having the absolute interest and ownership therein.

By the 12 Car. 2, c. 25, § 3, power is given to the king's agents for the granting of wine licenses to any person or persons for any time or term not exceeding twenty-one years, if such person or persons shall so long live, upon such rent as shall be agreed on, to be paid half-yearly; such licenses are not to be granted to any but those who personally use the trade of selling by retail, or to the landlord of such house, nor shall the same be assignable, or of any benefit but only to the first taker.

By the 22 & 23 Car. 2, c. 14, § 6, power was given to the master and chaplains of the Savoy, to encourage the rebuilding thereof, to demise any of the lodgings for any term not exceeding forty years, under such rents as they could procure, without renewing.

[By the 27 G. 3, c. 26, the lord treasurer, or commissioners of the treasury for the time being are empowered to let to farm for any term, not exceeding three years, the duties upon post-horses.]

(B) Of the persons who may make Leases: And herein, first, of Leases made by Infants.

ß When it appears on the face of the instrument that the party, at the time of executing the agreement, had not power to grant a lease; held that it could not operate as such.

Hayward v. Haswell, 1 Nev. & P. 411.ℊ

As to leases made by infants, or such as are under the age of twenty-one years, what seems most considerable is, whether any, and what leases for years made by such are absolutely and *ipso facto* void, or only voidable by them; about which the opinions of the books seem a little unsettled.

Some opinions are, that all leases for years made by infants (*a*) without reservation of rent, are absolutely void, and not merely voidable.

Moore, 105; 2 Leon. 218; Hutton, 102; Roll. Rep. 441. (*a*) So, if a trifle only had been reserved, as a pepper-corn. Mod. 263.—But that a lease made by an infant to try his title is good, though no rent be reserved. Moor, 105; 2 Leon. 216; Noy, 130.

Other opinions there are, that leases for years in general by infants are only voidable, and not void, without taking notice whether any rent were reserved on such leases or not; and some even seem to hold, that though no rent at all be reserved, yet the leases are not thereby absolutely void, but only voidable by the infants when they come of age, and that they may confirm the same at their full age by accepting fealty, which is at least incident to every lease.

Lit. § 547; Co. Litt. 45 b, 308 a; Lev. 6; Moore, 78. [This opinion hath been confirmed by what fell from the court in the case of Zouch v. Parsons, 3 Burr. 1806.]

Also, most of the books agree, that if a rent were reserved on such lease for years, then it would be only voidable by the infant at full age, without saying how it would be if no rent at all were reserved, unless by implication that it would be void in such case.

Bro tit. *Leases*, 50; Moore, 663; Roll. Abr. 729, 730; 3 Mod. 307; 3 P. Wms. 210.

But all the books agree, that if an infant make a lease for years, he can-

not plead *non est factum*, but must avoid it by pleading the special matter of his infancy; which seems to favour the opinion of those who hold, that the lease is not absolutely void; for if the lease were absolutely void, there does not seem to be any good reason why he might not plead *non est factum*, as a feme covert certainly may do in such case, whose lease is absolutely void, so that no acceptance of rent after her husband's death can make it good.

5 Co. 119; 2 Inst. 483; Moore, pl. 132; Cro. Eliz. 127, 857; Poph. 178; 10 Co 43. Vide head of *Infancy and Age*, vol. 3, 610.

An infant copyholder without license of the lord made a lease for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ousted the lessee: and in this case, though it was agreed, that a lease for years, rendering rent, by an infant, of freehold lands was only voidable, yet it was urged that in case of a copyhold it would be otherwise, because the lease not being warranted by the custom would be a disseisin to the lord, and, consequently, a forfeiture of his copyhold, which being a great mischief to the infant, the court ought rather to help him, by adjudging such lease to be absolutely void. But notwithstanding this, it was adjudged that the lease was a good lease till avoided, and that a lease for years by a copyholder without license is not a disseisin; and admitting it should be a forfeiture in this case, yet if the lord enters for it, the infant may re-enter upon him, and so is at no mischief; and that the infant having accepted the rent at full age, he had made it good and unavoidable.

Latch. 199; Godb. 364; Ashfield and Ashfield, Noy, 92, and Jon. 157, S. C., which last book says, that it was held to be no forfeiture as to the lord, but that admitting it were, yet it was a good lease as to all strangers, and that for this reason principally it was adjudged such acceptance made it good.

If an infant takes a lease for years of lands, rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land, this makes the lease good and unavoidable, and, by consequence, makes him chargeable with all the arrears incurred during his minority. For though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance of possession after his full age, ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made.

Cro. Ja. 320; Kettley and Elliot, Brownl. 120; 2 Bulst. 69; Roll. Abr. 731, S. C., adjudged.

But if an infant possessed of a term for years sells it for money, and after he comes of full age receives part of the money for it, he shall avoid the grant notwithstanding; for the contract, as said, being void in the commencement, it cannot be made good by any subsequent act.

Dals. 64, *Curiam.*

By custom in some places an infant seised of lands in socage may at the age of fifteen years make a lease for years, which shall bind him after he comes of age; for the custom makes fifteen his full age for that purpose.

Co. Litt. 45 b.

An infant made a lease for years, and at full age said to the lessee, *God give you joy of it;* this was holden by Mead a good affirmation of the lease; for this is a usual compliment to express one's assent and approbation of what is done.

4 Leon. 4.

(C) Of Leases made by Husband and Wife.

[The father of an infant leased his son's lands for 20 years, and at full age, the son, upon the back of the indenture released all his right to the defendant: it was holden by Wray, J., that this lease was made by the father as guardian and voidable by the son; and that the endorsement by the son was a good assignment.

Anon. 2 Leon. 220, 221.]

ℊ Where an infant's land is granted during his infancy and on coming of age, he mortgaged the estate to the lessees, the deed reciting the lease was holden to be a confirmation of the lease.

Story v. Johnson, 2 Yo. & C. 586.ℊ

If the king within age makes a lease for years, this is binding presently, and cannot be avoided by him, either during his minority or when he comes of age; for the politic rules of government have thought it necessary that he, who is to govern and manage the whole kingdom, should never be considered as a minor, incapable of governing himself and his own affairs.

Plow. 212; Dyer, 209, Case of the Duchy of Lancaster.

(C) Of Leases made by Husband and Wife: And herein

1. *Of Leases made by Husband and Wife by the Common Law.*

It is clearly agreed, that if a husband, seised of lands in right of his wife, make a lease thereof by indenture or deed-poll, reserving rent, that this is a good lease for the whole term, unless the wife, by some act after the husband's death, shows her dissent thereto; for if she accepts rent, which becomes due after his death, the lease is thereby become absolute and unavoidable. The reason whereof is, that the wife after her intermarriage, being by law disabled to contract for or make any disposition of her own possessions, as having subjected herself and her whole will to the will and power of her husband, the law thereupon transfers the power of dealing and contracting for her possessions to the husband, because no other can intermeddle therewith, and without such power in the husband they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both. But to prevent the husband from abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death either to affirm and make good such lease, or to defeat and avoid it, as she finds most subservient to her own interest.

Bro. tit. *Acceptance*, 10, tit. *Leases*, 24; Jordan v. Wilkes, Cro. Ja. 322; Hob. 5. S. C.; 2 Anders. 42; Plowd. 137.

So, if the wife join in such lease for years by indenture, if not made pursuant to the 32 H. 8, c. 28, she is after her husband's death at liberty either to affirm it by acceptance of rent, or to dissent to and avoid it by bringing trespass, &c., in the same manner as if she had been no party thereto. For her joining during the coverture, when she was not *sui juris*, but under the power of the husband, will not bind her after his death; and if she chooses to avoid such lease, notwithstanding he joining therein, then it is so absolutely defeated *ab initio* as to her, that she may plead *non demisit*, because as to any interest that passed from her she did not demise, nor in truth had any power to contract, but the whole interest passed from the husband, and the lessee is in merely by virtue of the husband's contract. And yet, because the lessee by his acceptance of such lease admitted them

both to have power to join therein, he must accordingly, during the cover ture, declare of the lease by them both, as an essential part of the description of the lease whereby he makes title.

Cro. Ja. 563; Cro. Car. 165, 406; Cro. Ja. 617; Yelv. 1; Cro. Eliz. 769; Roll. Abr. 350.

But the indenture or deed-poll, whereby such lease was made, being no essential part either of the description or lease itself, because the husband during the coverture might have made it by parol only; therefore, it is neither necessary nor usual for the lessee in his declaration to make any mention thereof.

2 Co. 61; Plowd. 431 a; Leon. 192; Cro. Eliz. 438, 482; Sav. 109, 110, 112; Cro. Car. 527.

So also, if the wife's part in such lease were merely void, and her joining therein would have no effect to help the description of the lease, then the lessee ought in his declaration upon such lease to leave out the wife, otherwise his inserting of her as one of the lessors will vitiate his declaration; therefore, where the husband and wife sealed a lease for years of the wife's lands, and at the same time executed a letter of attorney to a third person to deliver such lease as their deed to the lessee, which he did accordingly, and then the lessee brought an ejectment, and declared of this by baron and feme; to which not guilty being pleaded, this special matter was found; the court, after argument, gave judgment that the plaintiff had failed in his declaration, because, as this case was, it was only the lease of the husband; for the delivery of the deed being essential to make it a complete deed, this ought to have been done by the wife herself in person; for she not being *sui juris* could not by such letter of attorney delegate any power or authority whatsoever to another, but such delegation was merely null and void; and, by consequence, the attorney's delivering it in her name was to no purpose, but it was only the lease of the husband, as being only effectually delivered by him; and, therefore, the plaintiff ought to have declared accordingly; for upon the matter it was no lease by the husband and wife, and then the plaintiff declaring upon it as such, hath failed in his description of the lease whereon he was to recover.

Yelv. 1, Wilson v. Rich; Cro. Car. 165, Hopkins's case; and the S. C., 2 Buls. 13, obscurely put, seem *cont.*

Accordingly, in another case, where in ejectment the plaintiff declared on a lease by the husband only, and not guilty pleaded, the like special matter was found as in the former case, and exception taken to the declaration, because the wife was omitted; yet the court held the declaration good, and disallowed the exception, because her manner of joining in the lease was merely void, as if she had not been named therein, and then the plaintiff in his description of such lease did well to omit her.

Cro. Ja. 617, Gardiner v. Norman.

But now if the husband and wife join in a lease for years by parol of the wife's lands, rendering rent; or if the husband solely make such parol lease, rendering rent; this determines absolutely by his death, so that no acceptance of rent, or other act done by the wife, will prevent its avoidance; the reason whereof given in the books is, that her assent ought to appear to be given at the time when the lease was made, which, without some deed or instrument in writing, it cannot do. But this seems a very indifferent reason, when in the case of a lease for years by the husband,

solely by deed, her assent appears not at all, but rather the contrary; and yet she may affirm such lease, if she thinks fit, after his death, as well as if she had joined therein. Therefore a better reason for this distinction seems to be, that the inheritance and right of the estate continuing still in the wife, notwithstanding the intermarriage, if the husband does nothing to discontinue or devest that estate, all charges of his thereout fall off with his death, which determines his power and interest over the estate. But a lease for years being an immediate contract for or disposition of the land itself, if the same appears in writing duly executed, so that there can be no variation or deviation therefrom attempted by the lessee after the husband's death; the law so far gives countenance to such lease, for the encouragement of farmers and husbandmen, that the same shall continue in force till the wife's actual dissent or disagreement thereto; but because there can be no such certainty of the terms of a parol lease, when nothing appears in writing to manifest them; therefore they, like other charges of the husband, fall off and drop with his estate or interest therein.

Walsall v. Heath, Cro. Eliz. 656; Cro. Ja. 563; Dyer, 91, 146; Leon. 192, 204.

If the husband and wife make a lease for years of the wife's land, without reservation of any rent, yet it hath been adjudged that this is a good lease by them both during the coverture, and that the wife, after the husband's death, may affirm the same by acceptance of fealty, or bringing an action of waste; so that the reservation of rent is not essential to the existence or continuance of such lease after the husband's death, but only a writing attesting the same, and the wife's allowance and approbation thereof; for as the husband made such lease at first, without any reservation of rent; so the wife, if she thinks fit, may continue the lessee in possession, after his death, upon the same terms.

Hut. 102; Cro. Eliz. 112, Jackson v. Mordant.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years, not warranted by the custom, which is a forfeiture of her estate; yet this shall not bind the wife, or her heirs, after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture. And the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife, after her husband's death, and such as are a continuing detriment to the inheritance, as wilful waste by the husband; or such acts as tend to the destruction of the manor, as nonpayment of rent, denial of suit or service; such forfeitures as these bind the inheritance of the wife after her husband's death; but in the other cases the husband cannot forfeit by his lease more than he can grant, which is but for his own life.

Savern v. Smith, 2 Roll. Rep. 344, 361; Cro. Car. 7, S. C.; Cro. Eliz. 149; Hedd v. Chalener, Cr. El. 149; 4 Co. 27.

If the husband, seised of a copyhold manor in right of his wife, lets copyhold land, parcel thereof for years, by indenture, and dies, this shall not destroy the custom of demising by copy, because the wife may enter and avoid that lease, the husband having no power by his own act or disposition to bind the inheritance of the wife.

Conesbie v. Rusky, Cro. Eliz. 459.

A man seised of lands, in right of his wife, makes a lease for years thereof by parol, and then he and his wife levy a fine to a stranger, and die: it was adjudged, that the conusee of the fine should avoid this lease; for

being made by parol only, it was absolutely void as to the wife, so that no acceptance, or act of hers, after his death, could make it good; and then the conusee, who came in wholly by the wife, shall take advantage thereof as the wife herself should have done, for the husband's joining in the fine was only for conformity; for the whole estate and inheritance passed from the wife, and nothing from the husband; and of void acts, or when they begin to be so, strangers may have the benefit.

Harvey v. Thomas, Cro. Eliz. 216; Leon. 247, S. C.; 2 Co. 77.

But, where the husband and wife by indenture made a lease for ninety-nine years of the wife's lands, though without reservation of rent, and after joined in levying a fine of the reversion to a stranger; the better opinion was, that the conusee should hold subject to this lease, for being by indenture, it was not absolutely void, but only voidable by the wife after her husband's death; and then when she joins in a fine of the reversion, before her time of election for avoidance thereof comes, this destroys her own power of election, because now she has nothing more to do with the estate; and it cannot transfer a like power of election to the conusee, because that was a thing merely in action, and peculiar to the wife, in regard of her coverture, and, consequently, the lease is become absolute, and the conusee shall hold subject thereto.

3 Leon. 153; Cro. Eliz. 152, Cadee and Oliver. *Adjourn.* according to both reporters.

A and B, joint-tenants for their lives; A takes C to husband; and they, by indenture, let their moiety for twenty-one years, reserving rent; then the wife dies, and B, the surviving joint-tenant, would have avoided this lease, as the wife might have done if she had survived her husband: but it was adjudged, that the lease being only voidable, and not void, *quoad* the wife, by her death this power of avoiding it is gone, and cannot be transferred to the surviving joint-tenant, who claims not under, but paramount her; and then the lease is become unavoidable during the life of the other joint-tenant; for the lease being good at first, the wife's disagreement to make it void, was more necessary than her agreement was to make it good.

Smalman v. Agborow, Cro. Ja. 417; Roll. Rep. 401, 441, S. C.; 3 Buls. 272, S. C.; Roll. Abr. 592, S. C.; 3 Mod. 300, S. C., cited. *Quære*, if the husband in this case has any, and what remedy for the rent incurred after the wife's death, for the reversion to which it was incident goes to the surviving joint-tenant, but he being in of that by title paramount, the lease has nothing to do with the rent; and the husband, for want of a reversion, can neither distrain nor avow for the same? But, *quære*, if he may not maintain an action of debt or covenant in law, or express covenant for payment of the rent, if there were any; and vide Bro. tit. *Leases*, 4; *Det.* 7; Dyer, 28 b, 29 a; Roll. Rep. 442.

Husband and wife, joint-tenants for sixty years, if they or either of them so long live; the husband by indenture lets the land for fifty years, to commence immediately after his decease, and dies; the wife survives; and if this was a good lease to bind the wife, was the question. It was objected, that it could not bind the wife, because it was not to commence till after the husband's death; that he might have outlived the whole term; and therefore it was as if he had granted the term to commence after his death; which being but a grant of a bare possibility, had been clearly void. 2. It was objected, that the husband dying before the lease took effect, the interest in the whole term vested in the wife by survivorship, and then the husband's disposition, which took not effect till his death, came too late to prevent it. But, notwithstanding, it was adjudged to be a good lease,

and not like the case put of a grant of his term after his death, for there nothing passed till his death but a bare possibility only; but here a good term is created in interest presently, to take effect in possession after his death. As to the second point, the husband having an interest to dispose of, he might in his lifetime have disposed of the whole term and it would have bound his wife; then here when he hath, by an act executed in his lifetime, disposed of an interest in part of the term; this by the same reason must be good, and binding upon his wife.

Grute v. Locroft, Cro. Eliz. 287; Moore, pl. 514, S. C. cited; 1 Co. 133, S. C. cited.

Husband and wife made a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters; the husband, before any day of payment, dies; the wife takes a second husband, and he at the day accepts the rent, and dies: it was holden that the wife could not now avoid the lease, for, by her second marriage, she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own before such marriage would have done; for he by the marriage succeeded into the power and place of his wife, and what she might have done, either as to affirming or avoiding such lease, before marriage, the same may the husband do after the marriage.

Dyer, 159; Roll. Abr. 475; 2 Roll. Rep. 132, S. C. cited.

A woman, guardian in socage, marries and joins with her husband, by indenture, in making a lease for years of the ward's lands, yet after her husband's death she may avoid the same; for though the husband has absolute power to dispose of all chattels, either real or personal, whereof he is possessed in right of his wife, and the wardship of the body and land, in this case is but a chattel; yet the wife being possessed of it in right of the infant, and accountable to him for the profits when he comes of age, the husband's disposition shall not bind her after his death, but that she may avoid it in right of the infant, whose guardian she still continues to be; and her own joining in the lease was not material, because she was then under coverture, and had no disposing power at all.

Plow. 293, Osborn and Jay; Co. Lit. 351 a; Roll. Abr. 343.

As the wife's acceptance of rent or fealty, &c., will make good and unavoidable leases for years, made by her and her husband, or by her husband solely, if they be by indenture or deed poll; so if the wife die before her husband, the same election and power of affirming or avoiding such leases descends to her issue or heir; for such leases are good, till those who succeed to the estate defeat and avoid them by their disagreement thereto.

3 Buls. 274; Roll. Rep. 403.

Therefore, where a woman, tenant in tail, having issue by a former husband, after his death married a second husband, and they, by indenture, joined in a lease for years of the wife's lands, rendering rent, and then the wife died without issue by the second husband, so that he was not entitled to be tenant by the curtesy; it was holden, that till the issue by the first husband entered, this lease remained good; and, therefore, the husband there recovered in an action of covenant against the lessee, upon issue found for him, there was no entry made by the wife's issue, because till then the lease was still subsisting, and, consequently, the lessee bound by his covenants in such lease.

Jeffery v. Guy, Yelv. 78; 1 Brownl. 89, S. C.

So, where a man, seised of land in right of his wife, makes a lease for years, rendering rent, and then his wife dies without issue by him, whereby he is not tenant by the curtesy, but his estate determined; yet he may avow for the rent till the heir hath made his actual entry, because the lease was at first good, and drawn out of the seisin of the wife; and therefore, till the entry of the heir, remains good between the lessor and lessee, so that the lessee may maintain an action of covenant, and the lessor distrain and avow for the rent, till the heir hath entered.

9 H. 6, 43; Bro. tit. *Avowry*, 123; Vaugh. 46.

2. *Of Leases made by Husband and Wife pursuant to* 32 *H.* 8, *c.* 28.

This statute hath made an alteration in the common law, and enabled all husbands seised of lands in right of their wives, to make leases for twenty-one years, or three lives, observing the directions therein mentioned; which leases bind the wives and their heirs, so that they cannot now, after the husband's death, avoid such leases as they might have done at the common law. But, if the directions in that statute are not observed, then the common law takes place, and the wives and their heirs are at liberty to avoid such leases in the same manner as they might have done before.(*a*)

32 H. 8, c. 28. (*a*) Doe v. Weller, 7 T. R. 478.

But as to the several qualifications requisite to make such leases good and binding, they being treated of at large under the head of leases by ecclesiastical persons, letter (E), we shall here only insert one case for the better understanding of the statute.

Husband and wife; the husband purchased land to him and his wife, and their heirs, and afterwards he, without his wife, lets this land for sixty years,(*b*) if they should so long live rendering 280*l. per. ann.* rent at the two usual feasts during the term; then the husband dies; and if this lease should bind the wife, by the 32 H. 8, c. 28, was the question? And it was holden by three justices that it should; for the words of the act are, *That all leases to be made by any person or persons having any estate of inheritance in fee-simple or fee-tail, in the right of their wives, or jointly with their wives, of an estate of inheritance, made before the coverture or after, shall be good, provided that the wife be made a party to every such lease to be made by her husband of any manors*, &c., *being the inheritance of the wife; and that every such lease be made by indenture in the name of the husband and wife, and she to seal the same, and that the rent be reserved to the husband and wife, and to the heirs of the wife, according to her inheritance therein:* so that the wife is appointed to join only when she hath the sole inheritance by the appointment of the rent, to be reserved to the heirs of the wife, and not when she hath a joint-estate as in this case; and then clearly by the body of the act, the lease by the husband solely is good, and the proviso doth not extend to it.

Cro. Car. 22, Smith v. Trinder. [This case was never decided; for, in consequence of Lord Hobart's doubts, a special verdict was found, and the matter was afterwards ended by arbitrament.] (*b*) Note; there was no question made upon these words, if, &c., as to the continuance of the lease, which, as it seems, determined by the death of either of them. Cro. Ja. 378; 5 Co. 9.

(D) Of Leases by Tenant in Tail: And herein,

1. *What Leases Tenant in Tail might have made by the Common Law.*

If tenant in tail after the statute *de donis* had made a lease for years and

died, this lease was not absolutely determined by his death, but the issue in tail was at liberty either to affirm or avoid it as he thought fit. And the reason why such leases for years were not holden to be absolutely determined by the death of the tenant in tail, who made them, was, either because they were drawn out of an estate of inheritance, which by possibility might continue for ever, and therefore was capable of enduring such a lease for years thereof; or because, being executed by the entry of the lessee, there ought to be an act of equal notoriety to defeat and undo it; which, if the issue in tail thought fit to wave, the lessee then continued his possession in the first contract and entry. And this was but a reasonable liberty given to the issue in tail, because it might well be supposed that his ancestor was not qualified to keep all his possessions in his own manurance and occupation, but must necessarily let them out to farmers and husbandmen, who, by their skill and understanding in the arts of agriculture and husbandry, would be best able to preserve and improve the soil; and by their yielding an annual rent or income to the lessor or tenant in tail himself, would enable him equally to provide for the necessities and exigencies of himself and his family; and since the issue in tail, who was to succeed to the inheritance and possessions of his ancestor, might be supposed equally ignorant of the way and manner of improving and managing them to the best advantage, and would therefore be under the like necessity of letting them out to others, and yet perhaps not be able to get so good a rent or income for them; therefore, to prevent the charge and trouble of renewing such leases, or the difficulty of finding out new tenants upon every death, the law thought fit not to intermeddle one way or another therewith, but left it to the choice of the issue in tail, whether he would continue them or not. Another reason why the law would not condemn such leases as absolutely void by the death of the tenant in tail, might be, the discouragement that would thereby arise to farmers and husbandmen, who would not be easily induced to take leases, or bestow any great pains or labour upon possessions, which they were to hold by so precarious a title as the life of the tenant in tail only; and therefore, for these and other reasons, such leases for years were not looked upon to be absolutely void and determined by the death of the tenant in tail who made them; but the issue in tail successively, as each came into the estate, was at liberty either to continue or avoid them, as they found convenient; and by this liberty the issue in tail was sufficiently secured against any injury or inconvenience arising from the contracts or leases of his ancestor, and the statute *de donis* in no danger of being impeached, since it was in the issue's own choice to consider thereof, and to govern himself accordingly, either in the affirmance or avoidance of such leases, as he found most for his advantage; therefore, (*a*) acceptance of the rent, or fealty, or bringing an action for recovery thereof, or an action of waste, were such acts as amounted to a confirmation of the lease, because these plainly manifested his intent to continue the lessee in possession upon the terms of his lease; and, by consequence, such issue could never afterwards avoid it during his own life.

Co. Lit. 45 b. (*a*) 7 Co. 8 b, Count of Bedford's case. Bro. tit. *Acceptance*, 10; Dyer, 46 a, 51 b, 95 pl. 40; Bro. tit. *Acceptance*, 13.

If tenant in tail makes a lease to A for twenty years, and the lessee makes a lease to B for ten years, and then the tenant in tail dies, and the issue accepts the rent of B, this is no affirmation of the lease, because B was under

no obligation of paying his rent to him, and is answerable for it over again to A, and therefore his payment to the issue in tail was voluntary, and in his own wrong, and the issue's acceptance thereof not conclusive more than if he had received it of a mere stranger; and, by consequence, the issue in tail, notwithstanding such acceptance may enter and avoid the lease. But, if the issue had accepted the rent from A, this had amounted to a confirmation of the lease made to A, and, by consequence, he could not after avoid the lease to B, which was derived thereout. But, if A had assigned five acres of the land in lease to B for the residue of twenty years, and the issue in tail had accepted the rent from B, this would amount to a confirmation of the entire lease to A, because the rent issuing out of the whole, and out of every part of the land, B, as to these five acres, succeeded in the place of A, by having his whole interest therein; and then the issue in tail, by acceptance of the rent from one, whose part, as to him, was equally chargeable with the whole rent, hath given his consent, that the whole estate chargeable therewith shall continue, though he chose to take his rent out of part only; for otherwise he would do injustice to A, who would be liable to make recompense to B, for the overplus of the rent, and yet have no recompense himself, if the issue might defeat the residue of the lease remaining in his hands.

Tenant in tail, before 27 H. 8, c. 10, of uses, made a feoffment in fee to the use of himself and his heirs: and, after, he and his feoffees made a lease for years, rendering rent; and after the statute made, tenant in tail dies seised, and his issue aliens the land by fine before entry upon the lessee, or receipt of the rent, and the alience accepts the rent: the great question was, if the alienee might after avoid this lease: and, by the better opinion of the justices of both benches, *præter Saunders*, the alienee could not avoid it, whether he received the rent or not, for the lease was not absolutely void by the death of the tenant in tail, but only voidable by the issue by his entry; then when the issue, before such entry, conveys over the land to a stranger, the lease, being not then avoided, continues still a charge upon the estate, and the stranger cannot enter to avoid it, because a right of entry can no more be transferred to a stranger than a right of action, and, by consequence, the conusee must hold subject thereto, having no means to avoid it.

Dyer, 51 b; 7 Co. 9 a; 1 Roll. Rep. 260; 3 Leon. 154; 2 Buls. 44; 4 Mod. 5.

If tenant in tail enfeoffs his eldest son within age, and he, after full age, makes a lease for years, and then the father dies, whereby he is remitted to the estate-tail, yet he shall not avoid the lease. So, if the son had disseised his father, and had made a lease for years, and then the father had died, by which the disseisin was purged, yet the lease would continue good and unavoidable; because in these cases the estate, out of which the lease was derived, is not defeated, but only the nature of it altered and changed; and the lease for years being an immediate disposition of the land itself, so long as that continues in the same person that made the lease, so long there is an estate capable of enduring the lease, and, consequently, the lessor shall not avoid it; but, if the son after such feoffment or disseisin had at full age granted a rent-charge, common of pasture, &c., and then the father had died, this remitter and alteration of the nature of the estate would discharge the land of those charges; because, being granted at first out of a defeasible estate, they were of course liable to be defeated with that estate, and when that estate is defeated and gone, such collateral charges drop and fall off

with it; but the lease for years, in the other case, carries the very possession of the land itself, and then the alteration that is made by the remitter can only work upon the reversion which was left in the lessor, not upon the possession of the lessee, which was divided and taken out of the estate before that remitter took effect; and the lease being made when he was at full age, prevents the operation of the remitter as to that lease, which was his own act.

Co. Lit. 349 a; Moore, 315; Dyer, 51 b.

Tenant in tail made a feoffment in fee to the use of himself and his heirs, and after made a lease for years, rendering rent, and died; the issue accepted the rent: it was holden, that this did not affirm the lease, because the issue was remitted to the estate-tail by descent, and so the lease utterly void, being made by the father, then tenant in fee-simple. And the difference between this case and the case next but one above mentioned, seems to be, that the lease there being before 27 H. 8, c. 10, the possession passed from the feoffees, and not from the tenant in tail himself; and then when that statute came, it could not execute the possession to the use, as to the reversion which was left in the feoffees; and so the possession of the lessee continued untouched by that statute, and drawn out of the legal possession of the feoffees, and then the bare remitter of the issue, as to the reversion, could not defeat the possession of the lessee, which was not drawn out of any estate his ancestor had then in possession; but he must avoid it by entry upon the aid and construction of the statute *de donis*. But in this, the lease for years is drawn out of the fee-simple and estate, which the tenant in tail had in possession himself; and then the remitter, which is wrought by the descent, defeating that estate, avoids the lease likewise.

Moore, pl. 1143.

If tenant in tail makes a lease for ten years to begin ten years hence, and dies, and the issue within the ten years enters and makes a feoffment in fee, the feoffee, at the end of the ten years, shall have election either to affirm and make good such lease, or to avoid it; for upon the death of tenant in tail the possession was become vacant, and none had a right to enter but the issue in tail, for the time of the lessee's entry was not yet come; then when the issue enters generally, his primary right was, in respect of the inheritance, descended to him as issue in tail, and he had no occasion to direct his entry at that time to any other purpose; and therefore his entry shall be intended, in respect of the estate-tail descended to him; and when after such entry he makes a feoffment in fee to a stranger, this transfers the possession just in the same plight as the issue in tail himself had it, without any thing done to determine his election one way or another; and then the same power of election passes incorporated in the feoffment; and the feoffee, when the time for making use thereof is come, may use it either to determine the lease by ousting the lessee, or to affirm or make it good by acceptance of rent from him.

Dyer, 279 a; Plow. 436.

If tenant in tail makes a lease for years, to begin after his death, rendering rent, and dies, and the issue accepts the rent, yet Manwood was of opinion, that he might notwithstanding enter, and avoid the lease; and the reason he gave was, because the lease did not take effect in possession during his life; *sed* Catlyn *hoc negavit*. And it seems with good reason; for since the estate-tail is an estate of inheritance, capable of enduring such

a lease, where the difference is between letting it to begin presently, and letting it to begin after his death, or, as it is in the next preceding case, to begin ten years hence, when he himself dies in the meantime, does not at all appear; for the lease binds from the time of the making in one case, as well as in the other, though the time of their commencement in possession be different; and since the issue in tail is no more bound by the one than the other, it seems hard and inconsistent to take from him his power of election to continue the one lease, and yet allow it in the other; therefore it should seem, the lease in either case is (*a*) absolutely void, but that the issue hath election to continue or avoid it, as he himself thinks fit, and, by consequence, his acceptance of the rent hath determined his election to continue the lease, and then he can never enter after to avoid it.

Dyer, 279 a; Plow. 436. (*a*) But *qu.?* for in Carth. 258, in the case of Symonds and Cudmore, it is said to be agreed, and resolved by the court, that if tenant in tail makes a lease of any of the lands entailed to commence after his death, this is void *ab initio*.

If a tenant in tail makes a lease for life, by which he gains a new reversion in fee during the life of tenant for life, and after he grants a rent-charge, or makes a lease for years, and then the tenant for life dies, whereby he is become again tenant in tail, and the reversion in fee, out of which the rent-charge or lease for years were to take effect, defeated, yet shall the lease or rent continue good against himself; because, though they were granted out of a defeasible possession, yet they were granted likewise by him who had the true and ancient right in him; and such grant or lease would have bound both, if the defeasible possession had been in one hand, and the ancient right in another, and both had joined therein: so, by the same reason, when such defeasible possession and ancient right are conjoined in one person, and he makes such lease or grant, though the one fails, yet the other will be called to support them. So, if such tenant in tail had made a feoffment in fee upon condition to the use of himself and his heirs, and then had made such lease, or granted such rent-charge, and after the condition were broken, yet the lease or grant would still continue good against him during his own life; because made by one who had all the right, both ancient and new, in him at the time of making or granting thereof.

7 Co. 14 a; Co. Lit. 349 a; Co. 147; Moore, 325.

A, tenant in tail, remainder to B in tail; A makes a lease for the life of the lessee not warranted by the statute of 32 H. 8, c. 28, and dies, leaving B in remainder his heir; B by indenture makes a lease for 99 years, to commence after the death of the tenant for life, rendering rent; then the tenant for life surrenders to B upon condition, and dies; B suffers a common recovery with single voucher, and dies; the lessee for years enters, and the heir of B distrains for the rent: and if this distress was lawful, was the question? For the lessee it was argued, that it was not; for either B was remitted by the surrender, or he was not; if he was remitted, then the lease for 99 years, which was derived out of the new reversion in fee, and descended to him from A, was by such remitter determined; the reversion out of which it was derived being vanished and gone; and then he could not distrain for rent where no lease was in being: if he was not remitted, the acceptance of the surrender being his own act, and but upon condition, then he was still in of the defeasible estate descended to him from A, and, by consequence, his recovery with single voucher could not bind his entail, nor the remainder over; and then when he died without issue, (as to make it a case it should seem he must,) both his defeasible estate by the death of

the tenant for life, and his own estate-tail were determined and gone; and, consequently, admitting the lease continued, (which it did not,) yet his heir was not entitled to the rent, but those in remainder. But it was adjudged in C. B. that the distress was lawful; for the lease for life made by A could be a discontinuance no longer than during the life of the lessee; then when B after the death of A made a lease for 99 years by indenture, he having then the right of the entail in him, clothed with a defeasible fee-simple, this lease, when the discontinuance was at an end, (as it was by the surrender of the tenant for life, or at least by his death,) is good against himself by estoppel, if not in point of interest; and then, he being tenant in tail, the recovery with single voucher binds that estate-tail and remainder, and, by consequence, his heir has a good title to the rent, and his distress well taken for it. *Note;* A writ of error was brought of this judgment in B. R. and the case argued, but no judgment appears, nor are the reasons before mentioned taken notice of in the report; but yet they seem easily deducible from the report, and are the chief reasons (as it should seem) upon which the judgment in C. B. could be founded.
Vent. 357, Anonymous.

A, tenant for life, remainder to B in tail, B lets to C for years, to commence after the death of A, then B suffers a recovery to D and dies; the lease for years holds good against D. In this case it must be intended, that the recovery was suffered after the death of A, for during his life B was not tenant to a *præcipe;* then admitting the recovery to be after the death of A, this was after such time as the lease took effect against B so as to be absolutely binding upon him; and when he afterwards suffers a recovery, this bars the estate-tail, in respect of which only the lease was voidable, and, by consequence, the recoverer, who has not that estate-tail, must hold subject to the lease, and can no ways avoid it.
Dyer, 51 b, in margin.

So, tenant in tail, with power to make leases, &c., made a lease for twenty-one years not pursuant to his power, and then levied a fine, and died, leaving issue; and if the conusee should avoid this lease, as the issue might have done, if the fine had not been levied, was the question. For the lease did not take effect during the life of the tenant in tail. And it was agreed, that (*a*) if tenant in tail grant a rent, or acknowledge a statute, or make a lease for years to begin after his death, that these are void as to the issue, and not merely voidable; but, if tenant in tail makes a lease for years without reservation of any rent, this is not void, but only voidable, because the issue may affirm it by acceptance of fealty. And by all, except Twisden, the lease in the principal case was holden not to be absolutely void upon the death of the tenant in tail, but only voidable, because it was an immediate disposition of the land itself, and therefore differed from the cases of collateral charges granted thereout. And they held it to be for the benefit of the issue to have such leases only voidable. And so indeed it is, as appears by all the cases and reasons before mentioned. Then this lease not being absolutely void, but only voidable, when the tenant in tail levies a fine, by which he binds the estate-tail, and bars the issue before the time of election for avoidance thereof is come; this does not make the lease indefeasible, but transfers the estate chargeable with the future lease just in the same manner it was in the hands of the tenant in tail, without any act done either to affirm or avoid it; and then the conusee, when the lease is to commence in pos-

session, must have the same election of avoiding or affirming it, as the issue in tail would have had; for if the lease was voidable, and the levying of the fine before its commencement had no influence upon it one way or other, then it must continue voidable still, and it must continue so only as to the conusee; for the tenant in tail, or his issue, have nothing to do therewith, and, by consequence, if it does not continue voidable as to the conusee, then he may use his power either to affirm or avoid it, as he sees most convenient. And a diversity was taken between a voidable lease by tenant in tail, which is to commence *in præsenti*, and such voidable lease as is to commence *in futuro;* for (*b*) if tenant in tail makes a lease for years to begin presently, which is not warranted by 32 H. 8, c. 28, and, consequently, is voidable by his issue, if he in the mean time conveys over the land by fine, the conusee shall hold subject to that lease, and shall never after avoid it, because the lessee was then actually in possession of his lease, and so that possession divided and taken out from the inheritance which the conusee purchased; and then the right of entry, which would have come to the issue, and was necessary to the avoidance thereof, cannot by the fine be transferred to the conusee who is a stranger; and the issue is bound by the fine from making any use of that right of entry, and, by consequence, the lessee shall take advantage thereof, and hold his lease without avoidance from either. But, where such voidable lease is to commence *in futuro*, and before the commencement of it the tenant in tail levies a fine to a stranger, there the election to avoid or continue it passes incorporated in the fine, and it cannot be said to be either a right of entry or a right of action; for the lessee not being yet in possession, no entry is needful or can be made to avoid his lease, and the fine has no effect upon it one way or other, but leaves it just as it was; and, by consequence, being voidable after the fine as much as it was before, the conusee only can use the power of avoiding or continuing it since the issue is bound by the fine, and has nothing to do with it. And it must continue the same after the fine as it was before, because the time for its commencement was not then come; and it could not be either affirmed or avoided before it had a beginning. And so it should seem to be, and for the same reasons, where tenant in tail makes a lease for years, to begin expressly after his death, this is not absolutely (*c*) void by his death, but only voidable, notwithstanding the opinion at the beginning of the case.

Opy v. Thomasins, Lev. 167; Sid. 260, S. C.; Raym. 132, S. C.; Keb. 778, 910, S. C.; 4 Mod. 6, S. C. cited, and there said by Justice Dolben, that it was neither well stated nor well reported in the books; for upon the roll it was thus: A man seised in fee made a lease for 99 years, if three persons so long lived; then he settled the reversion upon himself in tail, with power to make leases for 21 years, and then he made such a lease, and died; the son, who was the issue in tail, and not the father, (as it is reported in the books,) levied a fine, and sold the reversion; the first lease determined, and the court thought the conusee might avoid the second lease, because it never was in the election of the tenant in tail, or his issue to avoid it, they having conveyed away their estates before this second lease was to commence; for if tenant in tail makes a lease to commence *in præsenti*, and conveys away his estate by fine, the conusee must hold it charged with such lease; *secùs*, where it is to commence *in futuro*, because it cannot be avoided before its commencement; but no judgment was given. (*a*) Vide Cro. Jac. 455; Griffin v. Stanhope; Machell v. Clarke, 2 Ld. Raym. 778. (*b*) For which vide 2 Lev. 28; Mod. 109; Benson v. Baron and Hudson. (*c*) But *quære, et vide supra.*

Tenant in tail of a manor before 27 H. 8, c. 10, made a feoffment in fee to his own use, and died, and in the time of the issue the statute of uses is made, and after the issue makes a lease for years of a tenement, parcel of

the manor, rendering rent, and dies, whereby his issue was remitted by the descent of the fee and freehold in law, without entry, though the first issue was not remitted, by reason of the statute of uses, which executed the possession in the same manner as he had the use (and that was in fee) before entry; and his issue makes a feoffment in fee of the manor, and livery in another part, not in the tenement leased, in the name of the whole: and if this was a discontinuance of this tenement, was the question? Coventry was of opinion it was not, because the issue who made the lease granted it out of the fee and right of the tail, which was in himself at the time of the lease made; and therefore by the remitter of his issue the lease was not void before entry, but only voidable; for he might have made it good by acceptance of the rent from the lessee: and, by consequence, if this was a lease continuing at the time of the feoffment of the manor, this tenement could not pass by the livery made in another part of the manor. But at last the whole court held, that this tenement passed by the feoffment, because by the remitter of the issue the lease for years was absolutely defeated and gone, and the lessee become tenant at sufferance; and if the issue had accepted the rent, this would not have made the lease good, because the reversion and inheritance, out of which it was derived, was by the remitter vanished and gone; and then the continuance in possession of the tenant at sufferance at the time of the feoffment of the manor is no impediment to the operation of the livery upon that tenement, and therefore the remitter destroyed the lease in this case.

Roll. Rep. 260, Bridgman v. Charlton.

Tenant in tail, reversion in the crown, makes a lease for years, rendering rent, and dies, leaving B his son and heir in tail, who accepts the rent, and hath issue C; then B commits treason, and is attainted thereof, and by act of parliament all his lands and possessions are forfeited, and given to the king; and if the king was concluded by this acceptance of the rent by the issue so that he shall be adjudged in by him, and could not avoid the lease so long as there was any issue in tail, was the question? And it was adjudged, that by the attainder the estate-tail was determined, and the king in, in point of reverter, and then all leases, charges, &c., of the tenant in tail are determined as if he were dead without issue. The reason whereof, given in the books, is, that if it should be otherwise, the king would have two fees in him which the law will not allow. And this may be a good reason; but it is such a one as wants another reason to explain it; for the same books agree, that if tenant in tail with the reversion in the king had made a lease for years, and after had levied a fine to the king, that the king in that case should not avoid the lease for years, no more than he should if the remainder in fee had been in a stranger, or in the tenant in tail himself, and yet in these cases the king hath two fees in him, and the law allows them to consist well together; therefore the reason of the difference between the cases seems to be, that where the reversion is in the crown, the crown, by consequence, must be the donor, and give out the estate-tail: now all donations created a tenure between the donor and donee, to which homage, fealty, and other duties and services were incident and annexed, as the conditions whereby the tenant was to hold and continue the enjoyment of his land. Now treason was the greatest violation possible of these duties of fidelity, obedience, and service, whereto the tenant was obliged, as the very terms and conditions upon which the king at first was prevailed upon to give him the land, and which he, when he accepted thereof, undertook to

observe, by the solemnity of an oath; so that when the donee commits treason, he breaks the condition whereby he holds his estate, and the king is in for that condition broken, and, by consequence, his title by virtue of that condition is paramount all leases, grants, or charges of the tenant in tail: for they being derived out of his conditional estate can subsist no longer than that does, and by his attainder of treason the condition is broken, and that estate forfeited and gone to the king in reversion who gave it; and, by consequence, all derivative leases or charges thereout are determined likewise. But now when the king has only the remainder in fee, there is no immediate tenure of the king, nor is the tenant obliged to any particular duties or services of homage or fealty to the king, as annexed to his donation, more than any other of his subjects; for he had not his estate of the gift of the king, but of his own immediate donor; and then though the law has given the forfeiture of all estates for treason to the king, of whomsoever held, yet this is a positive law, introduced but lately, and the king in such case is in under or by way of conveyance of the estate-tail, and his title thereto begins but from the time of the treason committed, and, by consequence, he shall hold subject to all leases or charges made by the tenant in tail before that treason committed, as the tenant in tail himself should have done; and in the principal case, where the issue in tail by acceptance of the rent had made good the lease of his ancestor, as against himself, if the remainder in fee had been in the crown, and the issue in tail had been after attainted of treason, though the king should have the forfeiture, yet he should hold it subject to the lease, which the issue by such acceptance had made good against himself. And it should seem likewise, that the king being a stranger, and coming in under the estate-tail, shall be bound by that lease, not only during the life of the issue who accepted the rent, but also as long as there were any issue of the body of the donee; for the king being a stranger cannot have the right of the succeeding issue to avoid it; and whether the right of entry or action, which such succeeding issue would have to avoid the lease, be transferred to the king, depends upon the words and construction of the act of parliament which gives the forfeiture in such a case. So, in the case of the fine, where the tenant in tail makes a lease for years, and after conveys the lands by fine to the king, though the king in that case was the immediate donor, and had the reversion in him at the time of the fine levied, yet he should be bound by such lease, because the fine was only a conveyance of record, and passes the estate to the king, as it would do to any other person, and, consequently, the king shall take subject to that lease, as any other person must do. And in the principal case, *where the reversion was in the crown*, though the lease for years had been in every thing warranted by 32 H. 8, c. 28, and the issue in tail after the death of his ancestor had accepted the rent, and then been attainted of treason, yet the king should hold discharged thereof; because by the attainder the estate-tail was forfeited, determined, and gone, as if the tenant in tail had died without issue, and the king was in of his old or immediate reversion.

Dyer, 107 b, 115 a, 332 b; Plowd. 560; Hob. 324, 346; Cro. Eliz. 519; Yelv. 150; Godb. 324; 2 Roll. Rep. 491.

If tenant in tail makes a lease for years, and dies without issue, the lease is absolutely determined by his death, though it were in all things pursuant to the 32 H. 8, c. 28, so that no acceptance of the rent by him in the remainder or reversion can make it good; for the estate, out of which it was

derived, being determined that likewise must fall off with it; and the intent of the statute was only to enable the tenant in tail by such leases to bind his *issue*, which in no case before he could do, not to bind or any ways affect those in *remainder* or *reversion* after the estate-tail determined.

8 Co. 34; Moore, 133; Co. Litt. 44 a; Cro. Eliz. 602; Bro. tit. *Acceptance*, 19.

So, if tenant in tail makes a lease for three lives according to 32 H. 8, c. 28, this is no discontinuance, but determines with the estate-tail; and where Cro. Car. 156, Salwin and Clerk holds that it is a discontinuance, all the other(*a*) books are against it; and (*b*) Vaughan says, that case is all false and misreported, and that such lease being warranted by the statute cannot be a discontinuance; because the parliament, to which every man is party, allows of such leases; which, if they were tortious, as all discontinuances are, the parliament would never have allowed; and, therefore, if a warranty was annexed to such lease, yet it would make no discontinuance, because that determines with the estate likewise.

(*a*) As 8 Co. 34 a; Cro. Eliz. 602; Co. Litt. 333 a; Noy, 66; Sav. 77. (*b*) Vaugh. 383.

But, if such leases for three lives were not warranted by 32 H. 8, c. 28, then it would be a discontinuance, because it was a greater estate than the tenant in tail had power to make, and passed by livery, which took out the estate from the tenant in tail, and turned it into a reversion in fee, determinable upon three lives. So, if such lease for three lives not warranted by that statute, were made of parcel of the demesnes of a manor, and then the tenant in tail should lease for life, or convey the manor in fee to another, and the lessee attorn, yet the reversion thereof would not pass, because the first lease was a discontinuance of that parcel, so as the reversion thereof for the time was no parcel of the manor.

3 Co. 50; 9 Co. 140 b; 2 Roll. Abr. 59, Walter and Jackson.

Tenant in tail, the remainder in fee, the tenant in tail makes a lease, for lives, according to 32 H. 8, c. 28, and after dies without issue; and before any entry, he in the remainder grants over his remainder by fine; and if the conusee of the fine might enter upon the lessee and avoid his lease, was the question? Fenner argued that he could not, because where a freehold is given by livery, it cannot be defeated without entry; and cited a case where a man made a lease for life, remainder in fee, the tenant for life granted over his estate; then a *formedon* was brought against the grantee or assignee, and the tenant for life died, pending the suit; and it was holden by all the justices, (except Littleton and divers serjeants,) that the writ should not abate, unless he in the remainder had entered: so here, and then when before entry, he in the remainder grants over his remainder, the grantee shall have it but as a remainder, for so is his grant, and so the estate of the tenant for life, which was but voidable, is made good. And of this opinion were Wyndham and Periam. But Mead and Dyer held, that, by the death of tenant in tail without issue, the lease made by him, though for life, was absolutely void, and not merely voidable, because by his death without issue, the estate, out of which the estate for life was derived, is determined and gone; and so must the estate for life be also, for *cessante causâ cessat et effectus*. And this seems the better opinion and most consonant to the cases before put; for the death of the tenant in tail, without issue, was, in law, as much a determination of the lease for life, as if it had been expressly so limited; and then, when that time comes, the operation of the livery, and the end for which it was made ceases, and there needs no entry to avoid that

which by effluxion of time and operation of law is already spent and run out; and therefore the conusee of the fines comes immediately to the possession both in law and right, and the lessee's continuance of possession after is a wrong and trespass to him, and cannot be by force of the lease which is run out and expired, and, by consequence, must have determined the operation of the livery with it.
Godb. 9, pl. 12.

But, if tenant in tail makes a voidable lease for years or life, and dies, and the issue, before entry on the lessee, levies a fine to a stranger, the conusee shall not avoid the lease, because such lease being only voidable by entry, when the issue before entry conveys over the land by fine, the power of entry, which was the only means of avoiding such lease, is by the fine destroyed and gone; for a right of entry cannot be transferred to a stranger, any more than a right of action. So, if the tenant in tail himself, after such lease, had levied a fine to a stranger, or even to the reversioner, and died, yet they could not avoid the lease ever after; because if they could, it must be by reason of the right of entry transferred by the fine, which would have come to the issue if no such fine had been levied; and the law absolutely condemns all alienations of right only, whether it be right of entry or of action; and, consequently, in these cases, by such alienation, the lease is become absolute and unavoidable.
Jon. 61, 62; 2 Roll. Rep. 498.

A woman, tenant in tail, makes a lease for years, not warranted by 32 H. 8, c. 28, and after takes husband, and they have issue, and then the wife dies: the issue cannot avoid this lease during the life of the husband, because he is tenant by the curtesy of the freehold and reversion expectant thereupon; and though he should surrender his estate by the curtesy to the issue, yet this would not help him to avoid the lease till his death, because his estate as tenant by the curtesy is a continuance of his wife's estate, and so long as that lasts, the issue's time for avoiding the lease is not come; and notwithstanding the surrender, yet as to the lessee, who is a stranger, the estate by the curtesy has still an existence and continuance, as if no surrender had been made; for he being a stranger shall not suffer by such voluntary act of the tenant by the curtesy. And (*a*) Walsh was of opinion, that the power of avoiding such voidable leases runs so in privity to the issue in tail, that if such issue should marry, and his wife, after the death of the ancestor in tail, be endowed of the reversion of the lands in lease, that she should not avoid the lease, as her husband, the issue in tail, might have done; because though she be in in consequence of the estate-tail, yet she is not privy to her husband as to that purpose. Also, it was further held in the principal case, that if the woman, tenant in tail, had before marriage acknowledged a statute, and then married, and died, that this statute should be extendible in the hands of the tenant by the curtesy, and of the issue too, if he came in by surrender of the tenant by the curtesy during his life; but, if after such statute the woman had made a lease for years, rendering rent, and then married, and died leaving issue, the statute should not be extended upon the lessee. For as the statute was absolutely void and determined as to the issue, and the lease voidable by him likewise, the statute shall never be set up against the lessee, though the issue in tail thinks fit to waive his power of avoiding the lease; for then that would take away from him the rent, which might be the chief inducement that prevailed on him to affirm

such lease. Or if such lease were in all respects warranted by 32 H. 8, c. 28, and so not voidable by the issue; yet since the statute fell off, and became void by the death of the tenant in tail, as to the issue it shall never take place against the lessee, because that would take from the issue the rent, which 32 H. 8, c. 28, never intended to permit, but on the contrary, made the issue's enjoyment of the rent the principal reason of their investing the ancestor with power by such lease to bind the issue.

Dyer 46 b, in margin, 51 b, in margin, 363 b; Co. Litt. 326 a; 338 a, b, et vide Moore, 30. (*a*) In 2 Benl. 65.

But, if tenant in tail grants a rent-charge, and after makes a lease for years, or lives, warranted by 32 H. 8, c. 28, the lessee shall hold the land charged during the lease, not only in the lifetime of the lessor, but also after his death; by Jones and Yelverton. For this rent-charge meddles not with the possession, as the statute in the other case does; and therefore the lessee, in respect of the possession which he hath, shall be liable to pay the rent reserved to the issue; whereas in the other case, if the statute should prevail, this would deprive the issue from distraining for the rent, by devesting the lessee of the possession whereon the distress ought to be made.

2 Roll. Rep. 499; Mod. 110.

|| If a tenant in tail reserves an entire rent on a farm, in which leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner.

Rex v. Phillips, Wightw. 69; but see Doe v. Naylor, 7 Maule & S. 276, contra.||

2. *What Leases Tenant in Tail now make to bind his Issue, since the* 32 *H.* 8, *cap.* 28.

Here we shall premise that the statute 32 H. 8, c. 28, is an enabling statute, and was made purposely to give the tenant in tail (amongst others) power, by observing the directions therein specified, to bind his issue; so that they shall not now, after his death, avoid such leases as they might have done before by the common law, which was found to be very inconvenient, and a great discouragement to farmers and lessees, who, after they had paid great fines, and been at great costs and charges in building, and otherwise improving the lands and tenements so leased to them, were, after the death of their lessors, cruelly expulsed and put out (as the statute speaks) by the heirs of the lessors, by reason of private gifts in tail, &c., to their great impoverishment and undoing; therefore to prevent such mischiefs for the future, that statute provides, that all leases to be made of any manors, lands, tenements, or other hereditaments, by writing indented, under seal for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance, either in fee-simple or fee-tail, &c., shall be good and effectual against the lessors and their heirs, &c., provided that the said act shall not extend to any leases to be made of any manors, lands, &c., being in the hands of any farmer or farmers, by virtue of an old lease, unless the same old lease be expired, surrendered, or ended, within one year next after the making of the said new lease: nor to any grant to be made of any reversion of any manors, lands, &c., nor to any lease of any manors, lands, &c., which have not been most commonly letten to farm, &c., by the space of twenty years next before; nor to any lease to be made without impeachment of waste, or which shall exceed the number of twenty-one years, or three lives, from the day of the making thereof; and that upon every such lease there be reserved yearly, during

the same lease, due and payable to the lessors and their heirs, &c., to whom the said lands, &c., after the death of the lessors, would have come if no such lease had been made, so much yearly farm or rent, or more, as had been most accustomably yielden or paid for the manors, lands, &c., so letten within twenty years next before such lease thereof made, &c.
Co. Litt. 44.

These are the several qualifications requisite to all leases to be made by tenant in tail to bind his issue within the statute, the particular branches whereof being considered under the next head, letter (D), I shall here only mention some scattered cases, not so easily reducible to the method there used.

Tenant in tail, to him and the heirs male of his body, had issue two sons by divers venters, and died; the eldest son entered and made a lease for twenty-one years, reserving rent generally to him and his heirs and assigns, and died without issue, leaving two sisters his heirs at law; and if by this reservation the rent belonged to the second brother, to whom the reversion descended as heir male of the body of the father, was the question? for if not, then the lease could not bind him within 32 H. 8, c. 28. And it was strongly urged that the rent could not go to him, because he was neither heir general nor special to the lessor; that the reservation being to the heirs of the lessor, it could not go to the brother of the half blood. But, notwithstanding it was adjudged to be a good lease, and that the rent should go along with the reversion; for the words of the statute are, that the rent shall be reserved to the lessor and his heirs, or *to those to whom the lands would go if no such lease had been made;* and judges are to expound statutes, so as not to frustrate the design and intent of them; and here the intent was, that *the rent should go along with the reversion;* and so it may here, for the rent naturally follows the reversion, and the second brother is heir to the entail and reversion, though not to the lessor, and heirs *dicuntur ab hæreditate*, and therefore shall be taken *secundum subjectam materiam, et ut res magis valeat*, to comply with the intent of the statute; and they cited (*a*) Austen's case as a case in point, and so judgment was given accordingly.
Hard. 89, Cother and Merrick. (*a*) Dyer, 115.

Two coparceners tenants in tail, the husband of one of them, after her death, being tenant by the curtesy, joins with the other in a lease for years, rendering rent to them and their heirs: this was held no good lease within 32 H. 8, c. 28, because it is not reserved to the donee and his heirs, but to the tenant by the curtesy, jointly with the other; for rent goes strictly as it is reserved by the lessor, and not otherwise; and perhaps as this reservation is, if the tenant by the curtesy should survive, the whole rent would go to him by survivorship, and so the issue of the other coparcener have no recompense for his part of the lands leased; or if the rent should not survive, in regard of their several interests in the lands leased, yet since heirs, in case of the coparcener who joined, must be intended heirs of the body, to bring it within 32 H. 8, c. 28; so must it likewise be in the case of the tenant by the curtesy, and that may not happen to be the issue inheritable by force of the gift, because he may have issue a son by a former venter, who would be heir of his body; and therefore this seems to differ from the former case, because the same word *heirs*, being applied to both indifferently, cannot be intended to mean one sort of heirs in one case, and another in the other; and the tenant by the curtesy can have no heirs of his body inheritable as heirs of his body to the entail, for he had no estate-tail in him; and

therefore heirs of his body, if it should be so construed, cannot be restrained or governed by the same reasoning as will prevail in the case of the coparcener.

Latch. 45, Thompson's case.

So, if tenant by the curtesy, and the heir in reversion in tail join in a lease for years, rendering rent to them and their heirs; this lease is not warranted by 32 H. 8, c. 28, by reason of such general reservation, which will carry a moiety of the rent, at least, to the heirs general of the tenant by the curtesy, and so may cut off the issue in tail from that recompense the statute intended them as the consideration of their ancestors being allowed by such leases to bind them.

Palm. 484; Latch. 257, Stacy v. Clerke.

Lands were given to baron and feme, and to the heirs of their two bodies; the baron dies, leaving issue by his wife, who makes a lease for years according to 32 H. 8, c. 28, and if this lease was good by that statute, was the question? The objection against it was, that the statute says, the lease shall be good against the lessor and his heirs, and the issue does not claim as heir to the wife only, but as heir to them both; but Wyndham and Rhodes, justices, agreed clearly, that the lease should bind the issue within the intent of that statute, for between baron and feme there are no moieties, and the wife surviving is perfect and absolute tenant in tail, and, consequently, may make all such leases as that statute empowers tenants in tail to make.

Godb. 102, pl. 119.

Tenant in tail makes a lease for years, rendering 20*s.* rent, and after releases all the rent except 12*d.* and dies, and his issue accepts the 12*d.*, and the question was, if thereby he were concluded to distrain for the other 19*s.* reserved upon the lease? And Saunders and Catlyn were of opinion that he was concluded, but Whiddon and Dyer *contra;* and put this case, that if the lessor after such lease, should grant to the lessee that he should hold his lease without impeachment of waste, yet the issue may maintain an action of waste against him, of which there seems no doubt; or that the issue, if he had not accepted the 12*d.*, might have distrained for the whole 20*s.*; for if such release, either of rent or waste, should prevail, the statute 32 H. 8, c. 28, would be totally eluded; but it should seem, the issue's own acceptance of the rent hath concluded him, for his own time, to distrain for any more.

Dyer, 123, 304 a, pl. 53; 2 Roll. Rep. 403, 407; Ley. 78.

If tenant in tail makes a lease for years, reserving the usual rent to his issue, without any reservation to himself, this is not pursuant to the words of the statute; yet Fleming, Chief Justice, held it to be a good reservation, and the lease not voidable, for this reason, within 32 H. 8, c. 28, because the issue, for whom the statute chiefly intended to provide, sustains no prejudice.

Hard. 90.

An estate is made to husband and wife, and the heirs of the body of the husband; the husband makes a lease for forty years, rendering rent, and dies; the issue accepts the rent in the lifetime of the wife, and afterwards the wife dies; yet this shall not bind him, because his time for acceptance thereof was not come, the whole being vested in the wife for her life by survivorship.

3 Co. 64 b.

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Tenant in tail makes a lease for *twenty* years, rendering the usual rent, *habendum* from Michaelmas next ensuing: this seems a good lease, though it did not begin from the making of the lease, according to the proviso 32 H. 8, c. 28, for the intent of the statute was only that the lease should not exceed the number of twenty-one years, from the making, which this lease did not. And the case of (*a*) Thompson and Trafford, 35 Eliz. in B. R. was cited, where such a lease was adjudged by the whole court to be good, and well warranted by the statute; though my Lord Coke lays it down for one of his (*b*) rules, that leases upon that statute are not good, if they do not commence from the day of the making; which perhaps may be reconciled upon the same diversity, where they are under twenty-one years, and where not so; that from the time of the sealing and executing the lease, till the expiration thereof, there does not intervene more than twenty-one years. For if the commencement of the lease be at such a distance, that between the time of the sealing and executing thereof, and the expiration, there do intervene above twenty-one years, then such lease seems to be without any aid from this statute, though the time for continuance thereof in the possession of the lessee be under twenty-one years; for otherwise the tenant in tail might so procrastinate the commencement of the lease, as to have always the greatest part of the twenty-one years running out in the time of his issue, which the statute never intended to countenance.

Dyer, 246 a; Leon. 148, and vide 2 Bendl. 74, pl. 58. (*a*) Poph. 3. (*b*) Co. Lit. 44 a, 45 b.

So, where one made a lease for ten years, and after made another lease for eleven years, both these leases are good, because they do not in all exceed twenty-one years, and so the inheritance not charged with more than a lease for twenty-one years, which the statute allows.

Leon. 148.

Leases by tenant in tail, or husband seised in right of his wife of copyhold lands, are not within this statute of 32 H. 8, c. 28, but remain perfectly as at common law.

Cro. Car. 44.

Tenant in tail made a lease to a feme covert for life, the husband surrendered, and then the tenant in tail made a lease for three lives and died; the wife after the death of her husband, entered, claiming her lease, and died; and (*c*) held, that the issue shall not avoid the lease for three lives: and yet a conditional surrender of a former lease hath been expressly held not to be a sufficient surrender to make good any new lease to be made by virtue of this statute. *Quære* therefore the difference.

Moore, pl. 1084, Sydenham v. Caps. (*c*) 5 Co. 2; Co. Lit. 44 b, n. (1).

3. *When and in what Cases the Issue in Tail, or Strangers, shall be bound by voidable Leases made by Tenant in Tail.*

As this has already been in some measure cleared under the first branch of this head, there remain but few cases here to be inserted.

Baron and feme, tenants in special tail, with reversion in fee to the baron, the baron dies; A, his son and issue in tail, having also the reversion in fee, by indenture, in the lifetime of the wife, makes a lease to B for forty years, to begin after the death of the wife, rendering rent, and dies without issue; C, his sister, to whom the reversion descended in the lifetime of her mother, levies a fine *come ceo*, &c., with proclamations to J S, then the wife,

tenant in tail, dies; and if J S, the conusee of the fine, was bound by this lease, was the question? No judgment is given in the case, but the opinion of the court, upon the first and second argument, seemed to be, that the conusee could not avoid this lease. And the reason they went upon was, because this lease, at first, took its effect out of the estate-tail by way of conclusion, and out of the reversion in fee by way of interest; but the taking effect by way of conclusion was at an end by the death of the issue who made it, because he died before the estate-tail came to him; and so it rested barely upon the reversion in fee, which was well charged therewith; then when C, the sister inheritable likewise to both the entail and reversion in fee, levied a fine in the lifetime of the mother; this past the reversion in point of interest charged with that lease, and it likewise carried the estate-tail; not as an estate-tail, for that none could have but the donees and their issue, inheritable by force of the gift; much less when the issue who levied it had then nothing in the entail, her mother, who had the whole estate-tail in her, being then living; but it passed the estate-tail by way of bar or extinguishment, so that the lease which would have taken place out of the estate-tail by way of conclusion, if it had ever come to the lessor, and which did take place out of the reversion in point of interest, now that the estate-tail is put out of the way by virtue of the fine, then takes place out of the reversion presently, and, by consequence, the conusee, who has that reversion by conveyance subsequent to the lease, must hold it subject thereto; and the sister could not by the fine convey over the possibility of avoiding the lease, which she herself would have had if the estate-tail had come to her. And some held, that if either the brother or sister after the father's death, had acknowledged a statute, and then after levied the fine, and then the mother had died, that the estate-tail would be so barred and gone *quoad* the conusee of the statute, that he might lay on his statute against the conusee of the fine, who hath the fee-simple absolute in him, out of which the lease or statute were to take place; and the issue in tail only is inheritable to the privilege of avoiding such charges by virtue of his estate-tail, not the conusee, who is a stranger, and cannot have that estate. But afterwards when Coke came to be chief justice, he was clearly of opinion, that the conusee of the fine was not bound by this lease, for he held the lease to be clearly and absolutely void as against the sister and her conusee, and not merely voidable. Indeed if the son had come to the estate-tail, it would have bound him, and so it would his conusee, if he had levied the fine in the life of his mother; but he dying in the lifetime of the mother, who was perfect tenant in tail, the sister was not at all bound by this conclusion, but the lease, as to her, was absolutely void; and then of all *void charges* a *stranger* may take advantage, though of such as are only *voidable*, *privies only*, and *not strangers*, can take advantage. And he divided the case, and put it as if the reversion in fee had been in the donor, and such donor had made a lease for years, or granted a rent-charge, and then the issue in tail, in the life of the tenant in tail, had levied a fine, and then the tenant in tail had died, clearly the conusee of the fine should hold the land so long as there were any issue in tail; for during that time the conusee hath a fee-simple; and though the issue in tail here had the reversion in fee, which he passed to the conusee together with a fee determinable on the failure of issue, and the conusee cannot have two fee-simples in him, yet he hath such a fee-simple as shall be discharged of
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shall not determine or drown the other, but both shall have continuance *quoad* strangers, as if they were in several and distinct persons. And he also held, that if the daughter in this case had entered, and accepted the rent, yet clearly this acceptance would not have bound her, or made good the lease, because, as to her, it was absolutely void, and not merely voidable. And this seems the most reasonable opinion; but no judgment was given, but the case ended by agreement.

2 Buls. 42, 43, Errington v. Errington; 4 Mod. 3, S. C. cited.

A, tenant in tail, with reversion to himself in fee, makes a lease for 99 years, if two lives should so long live, to commence after the determination of a lease for years then in being; A dies, leaving B his eldest son and heir, who being the issue in tail levied a fine to the use of himself and his heirs; the first lease determines, then B enters upon his father's lessee; and if his entry was lawful was the question? and it was adjudged, that it was not; for this was an interest derived out of the estate-tail, and also out of the reversion, and being made by tenant in tail was not absolutely void as against his issue, but only voidable; then when the issue, without taking the advantage of the law gave him in respect of his estate-tail to avoid this lease, levies a fine of the estate, his estate-tail by such fine is extinguished or barred and gone, and, by consequence, his power to avoid this lease in respect of that estate-tail is gone likewise; and the conusee has no power to avoid it, because he is a mere stranger, and no ways in privity of the estate-tail; nor could this power to avoid the lease be transferred to the conusee, when the issue in tail had it only in respect of his estate-tail, which is now barred, or rather extinguished, as it was held to be, and so the lease took place of the reversion in fee. *Note;* This case seems to differ from that of Errington, *supra*, where the son, who had made the lease, died without issue in the lifetime of his mother, who was perfect tenant in tail.

Symonds v. Cudmore, 4 Mo.; 1 Salk. 338, pl. 3, S. C.; Carth. 257, 258, S. C.; Show. 370, S. C.; 3 Danv. 196, pl. 10, 11, S. C.; Skin. 284, 317, 328, S. C.; 3 Salk. 335, S. C.; 12 Mod. 32, S. C.; Holt, 666, pl. 1, S. C.; 1 Freem. 503, S. C.

‖ Charles Lord Shelburne, being tenant in tail-male of the lands in question, with remainder to his brother Henry in tail-male, with reversion in fee to himself, demised them for three lives, with covenants for perpetual renewal. Charles Lord Shelburne died without issue, whereby his brother Henry became entitled to an estate in tail-male in the premises, with the reversion in fee in himself. In the year 1697, Henry Lord Shelburne levied a fine of those lands, and in consideration of his marriage, settled them on himself for life, with remainder to his first and other sons, and covenanted for enjoyment free from all former encumbrances, other than the several leases then in being thereof. The lessees having claimed a renewal on the death of some of the persons for whose lives the leases were granted, Earl Henry refused to renew, alleging, that as his brother Charles was only tenant in tail of the lands comprised in those leases, he had no power to make them, and was not bound by the covenants for renewal. The court of exchequer in Ireland decreed, that the lessees were entitled to a renewal. From this decree there was an appeal to the House of Lords; and, on behalf of the appellants, it was argued, that tenant in tail at law, independently on the statute of 32 H. 8, had no right to make a lease absolutely to bind the issue in tail, and much less the remainder-man; and that, even by that statute, a tenant in tail had no power to grant leases to bind those in remainder; and therefore the leases in question were absolutely void as against the appellant,

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Earl Henry, who did not claim under Lord Charles, or as issue in tail, but as remainder-man. That the estate-tail, out of which the leases first arose, being spent, and the appellant not claiming under it, but by a distinct limitation to himself in tail-male, his fine could not let in Lord Charles's leases upon that estate, which came in lieu of the earl's estate-tail; nor could it, by consolidating the two estates, let them in upon the reversion, both because the earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement; by which, in consideration of his own marriage, the earl had an estate for life only, with remainder to his first and other sons; and these estates arose and were granted out of the estate-tail, which the earl had before the fine, and not out of the reversion. That even if the fine did let in the leases, the most that could be insisted on was, that it let them in during the continuance of those leases only, and could not extend to leases not then in being; for there could be no ground of equity to carry it farther, and make the fine give them a greater benefit than the law gives them; which is the mere legal effect of an act done for another purpose, and by accident only turns for their benefit, without any precedent right to it, or consideration for it, and therefore, with respect to the respondent, totally voluntary. That if it be objected, that in the settlement made by Earl Henry, there was an exception of the leases; and, consequently, this must establish them, and every covenant in them: it may be answered, that Earl Henry at that time, which was very soon after the death of his brother, had no notice of these leases; but there being many upon the estate, it was a prudent caution in the covenant against encumbrances to except the leases; by which, however, nothing more was intended than to secure the covenantor against any breach of covenant, or any loss or damage that might ensue therefrom. But there could be no ground for insisting that the exception in the covenant should establish or confirm the leases, any otherwise than so far as they were good and available in law; and much less that the respondent, or those under whom he claimed, who were no parties to the settlement, nor gave any consideration for this benefit, had a right to come into a court of equity to have the benefit of this exception, or any supposed agreement implied in it, in their favour. On the other side it was contended, that by the fine which Earl Henry levied in 1697, the estate-tail limited in remainder to him was barred and extinguished in the same manner to all intents, as if he was dead without issue; and the reversion in fee, which descended to him as heir of Lord Charles, immediately took effect in possession: and as the new uses in the marriage-settlement of 1697 arose out of that reversion in fee, they were therefore subject to all antecedent encumbrances and engagements which could affect that reversion. That as this reversion in fee, after it had taken effect in possession by means of the fine, was specifically bound by the covenants for perpetual renewal; and as such covenants are considered as real agreements, and go with the land; so they are in their nature proper for a specific performance, and will in equity affect the legal interest of all those who take the estate with notice of them. That all those claiming under the settlement of 1697 had notice of these leases and covenants, and were as much bound by an equitable lien on the land as Earl Henry himself; especially in favour of lessees, who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal. After hearing counsel on the above appeal, the following question was put to the judges; viz. whether by the fine levied by the appellant, the

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Earl of Shelburne, in 1697, the reversion in fee of the estate in question was let in, subject to the leases in question made by Charles Lord Shelburne, and the covenants therein contained for a perpetual renewal? And the Lord Chief Justice of the King's Bench having delivered the unanimous opinion of the judges to this effect; viz. that the leases for lives then in being were good and effectual, as being served out of the reversion in fee which Lord Charles had when he made them, and which was now in Lord Henry; and that the covenants for renewal were binding on Lord Henry, as a lien on the same reversion, which he had let in by barring, discharging, and extinguishing his estate-tail; it was ordered and adjudged, that the appeal should be dismissed, and the decree therein complained of affirmed. Shelburne v. Biddulph, 6 Br. P. C. 356; 3 Prest. Conveyance, 351, S. C.; 2 Cruis. Dig. 475.

Husband and wife tenants in special tail, with remainder to the husband in fee, by conveyance made by the husband, during the coverture have issue a son; the husband dies; the son in the lifetime of his mother levies a fine to the use of himself and his heirs; the wife after makes a lease for twenty-one years without reserving the ancient rent, and so not warranted by 32 H. 8, c. 28, and dies; the son hath issue, and by his will devises these lands to the defendant, and dies; the defendant enters upon the lessee, who brings ejectment; and it was adjudged in B. R. for the plaintiff, and that judgment afterwards affirmed in error in the Exchequer-chamber, after divers arguments; and in the case two points were made: 1. If this lease, being made by a jointress within 11 H. 7, c. 20, and not warranted by 32 H. 8, c. 28, be voidable by the issue in tail; upon the statute 11 H. 7, c. 20, in case no such fine had been levied? 2. If the conusee of the fine should have the same power to avoid the lease, either in respect of the estate-tail or the remainder in fee, as the issue should have had, if no such fine had been levied? As to the first point, it was resolved, that this lease was not within the 11 H. 7, c. 20, for it was no discontinuance, but only an ordinary lease for years, which the wife might survive; and therefore this differs from a lease for life or lives made by a sole jointress, not warranted by 32 H. 8, c. 28, for that makes a discontinuance presently, and is expressly within 11 H. 7, c. 28. Also, this differs from the case put, (*a*) in Sir George Brown's case, that if a woman jointress in tail accepts a fine *come ceo, &c.*, and grants or renders the land for 500 or 1000 years, to evade the act, that yet this is an alienation within the meaning of that act, as much as if she had expressly levied a fine for 500 or 1000 years, because in both cases, after her death, such fine would bind the issue in tail, which that statute intended to prevent. But because such fines passing only an interest for years, and not meddling with the freehold, make no discontinuance, nor can be forfeited with collateral warranty, therefore during the life of the jointress they continue good, she continuing still tenant in tail, as she was before, at least in case of the fine levied by her for years; but after her death the issue in tail may avoid them, because otherwise they would be prejudicial to him in binding his inheritance, and so would be equivalent to a discontinuance; and therefore after the death of the jointress in such case the issue in tail may avoid them by 11 H. 7, c. 20, but not before. But this lease for twenty-one years being made in the ordinary form, by indenture, is not within the statute 11 H. 7, c. 20, and therefore if the jointress in this case had made a lease for 100 or 1000 years by indenture only, this would be no alienation within 11 H. 7, c. 20, because the issue might avoid it by the statute *de donis;* so that there

appears a manifest difference between leases for life or lives, and leases for years, and also between leases for years made by fine, and leases for years made only by indenture or deed poll; but, if such lease, either for lives or years, were in all things warranted by 32 H. 8, c. 28, then they would be good and binding upon the issue. As to the second point, if the conusee of the issue in tail should have the same power of avoiding the lease, either in respect of the estate-tail or the remainder in fee, as the issue himself should have had if no such fine had been levied; it was resolved, that he should not, but that the lease was good, and unavoidable; for notwithstanding the fine levied by the son, the mother continued perfect and absolute tenant in tail; and therefore the lease made by her would not have been absolutely void against the issue, but only voidable, if he had levied no fine; but now having levied a fine, this hath barred the issue and the entail, so that the issue himself cannot avoid this lease; for he hath nothing to do with the entail; and the conusee cannot avoid it, because he is a stranger to the entail, which could not be transferred to him by the fine, but only be extinguished as an estate-tail; and the statute *de donis* helps only the issue and those in reversion or remainder. And though the fine carried likewise the remainder in fee, and after the death of the wife the entail was not *in esse*, but determined; yet this was only between the conusor and conusee; for as to the feme, and all strangers, the estate-tail continues so long as there is any issue. And no diversity when the fine of the issue is precedent to the lease, and when subsequent; for the lease is good against all but those who were aided by the statute *de donis;* and when the issue in tail by his own act hath extinguished or barred the estate-tail, and destroyed the privity, the lease continues good and unavoidable so long as any of the issue in tail are in being: and if the feme in this case, after the fine levied by the issue, had made a feoffment in fee, and died, the feoffee should have held the land against the issue and his conusee, so long as there were any issues in tail. And, if tenant in tail makes a lease for years, and after levies a fine to him in the reversion, and dies, leaving issue, though in this case he in reversion shall be in of his ancient reversion, yet he shall not avoid the lease during the lives of the issues in tail; for as to strangers, the estate-tail hath continuance in right, though as to other purposes he shall be in of an estate in fee. And therefore the difference between this and Sir George Brown's case is, that the lease there for three lives was a discontinuance, and then 11 H. 7, c. 20, gives title of entry to him to whom the interest after the death of the feme should appertain to avoid it; but here this lease for years was no discontinuance, nor at all within that statute; and then it remains at common law, where none but the issue in privity of the estate-tail, or those in reversion or remainder, shall avoid it; and here the estate-tail, as to all strangers, hath continuance, and then the issue cannot avoid it, because he hath no estate-tail; nor the conusee, because a stranger to the entail; and so the lease remains absolute and unavoidable.

Roll. Abr. 842; Jon. 60; Hutton, 84; Cro. Jac. 688; 2 Roll. Rep. 490, 498; Croker and Kelsey, Sid. 62; Keb. 182, S. C. cited. (*a*) 3 Co. 51; 2 Roll. Rep. 491, and vide 3 Keb. 333, 436, 448.

If tenant in tail makes a future lease, and dies before it is to commence, such lease is merely void, without more circumstances; but the issue in tail has his election to make it good by accepting the rent, or by distraining and avowry, which amounts to an admittance of the lease, and so estops and concludes the issue to deny it; so that the election of the issue in that case

is only to support and make good the lease by some act of his own conclusion, and not an election to avoid it by his own act, because no such act is necessary; for the law esteems it void *ipso facto* by the death of the tenant in tail, unless the issue by some act make it good.

Carth. 260, in the case of Symonds and Cudmore, by Holt, C. J., against the three others who doubted.

Where leases are voidable only, the same may in some cases be avoided by one person, and yet revived and made good by another, and in some cases an avoidance of such leases by one person concludes all others to revive or set them up again; wherein the diversity is between those who at the time of the avoidance have the absolute fee and inheritance in them, and those who have only a temporary and particular estate or interest therein.

Therefore, if tenant in tail, or bishop, make a lease for years not warranted by the statute, so that the issue in tail or successor may avoid it; if during this lease the temporalities come into the hands of the king by the vacancy of the bishopric, or the wardship of the issue, and his lands come to the king, or any other, upon the death of the tenant in tail, by reason of a tenure by knight's service; in these cases the king, or other guardian, may avoid this lease in right of the bishopric or issue, whether made by the ancestor within age, or by the ward himself; but yet the successor, or issue, when they come to the actual possession of these lands themselves, may, by the acceptance of the rent, &c., and waver of the possession, re-establish and set up such lease again. So, where the king for his *primier* seisin avoided a lease for years made by a tenant in tail, yet it was adjudged, that after livery had, the issue in tail had election either to defeat or abide by such avoidance; and therefore if he accepted the rent from the lessee, and waved the possession, this set up the lease again.

7 Co. 35; Co. Lit. 46 a.

So, if the wife of tenant in tail being endowed of those lands, avoids a lease made by her husband during the coverture, for thirty or forty years, yet after her death the issue in tail, by acceptance of rent, and waver of the possession, may set up such lease again.

7 Co. 9; Co. Lit. 46 a.

So, if tenant in tail makes a lease for thirty or forty years, rendering rent, and dies without issue, his wife *privement enseint* with a son, and the donor enters, and as to himself avoids the lease; then the son is born, and the lessee re-enters; the son at full age may either affirm or avoid such lease, as he thinks fit; for the lease was not absolutely determined or avoided, more than the estate-tail itself, out of which it was derived, but only *secundum quid*, and subject to be set up again upon the birth of the issue, which revived the estate-tail. But, if such lease were made by the tenant in tail before marriage, rendering rent, and then he married, and died, leaving his wife *privement enseint*, and the donor enters, and as to himself avoids the lease; yet, if the wife be after endowed, the lease is revived as against her, because her estate is *quodam modo* a continuance of the estate-tail of the husband, and therefore revives all charges made by him before the marriage. But, if the wife be after delivered of a son, and die, now the issue may again avoid that lease or affirm it, as he thinks fit; or, if such lease were made after marriage, and the wife, being endowed thereof, avoid that lease, yet after her death the issue in tail may revive it; for in all these cases the avoidance of such leases being only by those who had a temporary estate or

interest in the land, cannot bind those who succeed to the inheritance thereof, but that they may, if they think fit, re-establish and set up such lease again, which, as to them, was at first only voidable, and not absolutely void.

7 Co. 9; Godb. 325.

But, if a woman be endowed of an advowson, which was appropriated, during the coverture, and she present, and her presentee be admitted, instituted, and inducted, though the incumbent dies during the life of the doweress, yet is the appropriation defeated and dissolved for ever; because the incumbent, who came in by her presentation, had the whole fee and estate in him, as much as any incumbent ever can have, and consequently, there can be no reversionary or contingent interest left to revive the appropriation. But, if the wife in this case had died before any presentation, then the appropriation had remained untouched; for then nothing had been done to defeat or alter it, and make it presentable; for the actual presentation only defeats and dissolves the appropriation, not the bare power of presenting without it be reduced into execution.

7 Co. 8 a; Co. Lit. 46 b.

(E) Of Leases for Lives or Years by Ecclesiastical Persons: And herein,

1. *What Leases they might have made by the Common Law, and of the several enabling and disabling Statutes with some general observations on them.*

As to leases made by ecclesiastical persons, by the common law, we shall but briefly observe, that all ecclesiastical persons had in former times as full power and authority to lease, grant, or alien their possessions, as temporal persons had, that is, if the grant, &c., made by a sole corporation was with the consent of others, whose confirmation was in such case necessary; for though deans and chapters, masters and fellows of colleges, masters and brethren of hospitals, and suchlike corporations aggregate, might of themselves alone, without the consent or confirmation of any, have made long leases for lives or years, or gifts in tail or fee, at pleasure; yet bishops, deans, &c., seised in right of their bishoprics, deanries, &c., so archdeacons, prebendaries, parsons, vicars, if they aliened or leased, must have had the consent and confirmation of others, who had the power of confirming in that behalf, and then their grants, &c., were as good as those made by aggregate corporations.

Comp. Incumb. 415.

But the law, as to the capacity of clergymen in granting, leasing, &c., being greatly altered by divers acts of parliament, and those not a little intricate and perplexed, it will be necessary to set down the statutes themselves, to render the cases reducible to them more clear and intelligible.

The first statute concerning leases by ecclesiastical persons, which is also the only statute that gives directions concerning leases by tenant in tail, or husbands seised of lands in right of their wives, is 32 H. 8, c. 28, which provides as followeth: "Whereas great numbers of the king's subjects have heretofore taken leases of lands, tenements, and other hereditaments, for term of years, and divers of them for term of life, and have given and paid great fines and great sums for the same, and also have been at great costs and charges, as well in and about great reparations and buildings upon their said farms, as otherwise concerning their said farms; yet notwithstanding the said farmers, after the deaths or resignation of their lessors, have been, and

be daily, with great cruelty, expulsed and put out of their said farms and takings by the heirs or successors of their said lessors, or by such persons as have interest therein, after the deaths or resignations of their said lessors, by reason of privy gifts of entail, or for that the lessors had nothing in the lands, tenements, or other hereditaments so letten at the time of the leases thereof made, but only in the right of their wives, or such other like cause, to the great impoverishment, and in a manner utter undoing, of the said farmers; for reformation whereof, be it ordained, established, and enacted, &c., That all leases hereafter to be made of any manors, lands, tenements, or other hereditaments, by writing indented, under seal, for term of years, or for term of life, by any person or persons, being of full age of twenty-one years, having an estate of inheritance either in fee-simple or fee-tail, in their own right, or in right of their churches and wives, or jointly with their wives, of any estate of inheritance, made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same should have been, if the lessors thereof, and every of them, at the time of the making of such leases, had been lawfully seised of the same lands, tenements, and hereditaments comprised in such indenture of a good, perfect, and pure estate of fee-simple thereof to their own only use. § 2. Provided that this act or any thing contained shall not extend to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any farmer or farmers, by virtue of any old lease, unless the same old lease be expired, surrendered, or ended, within one year next after the making of the said new lease; nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments, nor to any lease of any manors, lands, tenements, or hereditaments which have not most commonly been letten to farm, or occupied by the farmers thereof, by the space of twenty years next before such lease thereof made; nor to any lease to be made without impeachment of waste; nor to any lease to be made above the number of *twenty-one years or three lives* at the most, from the day of the making thereof; and *that upon every such lease there be reserved yearly*, during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, *so much yearly farm or rent*, or more, as hath been most accustomably yielden or paid for the manors, lands, tenements, and hereditaments so to be letten within twenty years next before such lease thereof made; and that every such person and persons, to whom the reversion of such manors, lands, tenements, and hereditaments so to be letten shall appertain, as is aforesaid, after the deaths of such lessors, or their heirs, shall and may have such like remedy and advantage, to all intents and purposes, against the lessees thereof, their executors and assigns, as the same lessor should or might have had against the same lessees. § 4. Provided also, that this act extend not to give any liberty or power to any person or persons to take any more farms, leases, or takings, of any manors, lands, tenements, or other hereditaments, than he or they should or might lawfully have done before the making of this act: nor extend to give any liberty or power to any parson or vicar of any church or vicarage, for to make any lease or grant of any of their messuages, lands, tenements, tithes, profits, or hereditaments, belonging to their

churches or vicarages, otherwise, or in any other manner, than they should or might have done before the making of this act."

This act extends only to sole corporations, as bishops, deans, &c., but as to corporations aggregate, as deans and chapters, &c., though they be seised in right of their churches, this is no enabling statute: for they, by the consent of the major part of them, might have made any leases or grants of their estates without limitation before this statute, and so they might have done after, till by other subsequent statutes they were restrained, this being merely enabling, and not at all restraining them. And though by this statute the sole corporations before mentioned could not, without the consent and confirmation of others, have made leases for three lives, or twenty-one years, yet with confirmation they might have made longer leases, or absolute alienations, of any of their possessions; and therefore to restrain bishops, and other ecclesiastical persons, were the statutes of 1 & 13 Eliz. made, which are as follows:

10 Co. 60 a; Moore, 107.

For the restraining of bishops, the 1 Eliz. c. 19, § 5, says, "That all gifts, grants, feoffinents, fines, or other conveyances, or estates from the first day of this present parliament to be had, made, done, or suffered, by any archbishop or bishop of any honours, castles, manors, lands, tenements, or other hereditaments, being parcel of the possessions of his archbishopric or bishopric, or united, appertaining, or belonging to any the same archbishoprics or bishoprics, to any person or persons, bodies politic or corporate, (other than to the(*a*) queen's highness, her heirs or successors,) whereby any estate or estates should or may pass from the same archbishops or bishops, or any of them, other than for the term of twenty-one years, or three lives, from such time as any such lease, grant, or assurance shall begin, and whereupon *the old accustomed yearly rent*, or more, shall be reserved and payable yearly during the said term of *twenty-one years*, or *three lives*, shall be utterly void and of none effect to all intents, constructions, and purposes; any law, custom, or usage to the contrary in any wise notwithstanding."

(*a*) This statute, leaving bishops their former power of granting to the queen, her heirs and successors, was to little effect, for that many estates were granted to the queen, upon design that she should grant them over to others, to prevent which was the statute 1 Jac. 1, c. 3, made, which disables all archbishops and bishops from granting any of their possessions to the king, his heirs, or successors, and make all such leases, grants, &c. to the king, his heirs or successors, utterly void and of none effect. 11 Co. 71; Gibs. Codex, 679.

The statute which disables all other ecclesiastical persons is 13 Eliz. c. 10, § 3, which is as followeth: "And for that long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and others having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors, incumbents in the same; be it enacted, That from henceforth all leases, gifts, grants, feoffments, conveyances or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other, having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapel, hospital, parsonage, vicarage, or other spiritual promotion, or any ways ap-

pertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate, (other than for the term of *twenty-one years* or *three lives*, from the time as any such lease or grant shall be made or granted; whereupon the *accustomed yearly rent*, or more, *shall be reserved* and payable yearly during the said term,) shall be utterly void and of non-effect, to all intents, constructions, and purposes whatsoever; any law, custom, or other thing to the contrary in any wise notwithstanding."

§ 4. "Provided, that this act, nor any thing herein contained, shall be taken or construed to make good any lease, or other grant, to be made by any such college or collegiate church within either or both the universities of Oxford and Cambridge, or elsewhere, within the realm of England, for more years than are limited by the private statutes of the same college.

§ 5. "Provided also, that this act shall not extend to any lease hereafter to be made, upon surrender of any lease heretofore made, or by reason of any covenant or condition contained in any lease heretofore made, and now continuing, so that the lease to be made do not contain more years than the residue of the years of the former lease now continuing shall be at the time of such lease hereafter to be made, nor any less rent than is reserved in the said former lease."

On these statutes we shall observe, 1. That the statute of 1 Eliz. c. 19, is but a private or particular statute, and must be especially pleaded, else the court will take no notice of it; but 13 Eliz. c. 10, is a general law, whereof the judges are bound *ex officio* to take notice, though it be not pleaded, because it extends to all ecclesiastical persons whatsoever, except bishops, who were before provided for by the 1 Eliz. c. 19.

5 Co. 2; 4 Co. 76; Moore, 253; Cro. Ja. 112; 2 Roll. Abr. 466; Leon. 306; Yelv. 106; Mod. 205; 2 Mod. 56.

It has been adjudged and holden in parliament, that the king was bound by 13 Eliz. c. 10, though not named, because the statute was general and for the public good: but for some time the law was holden otherwise; and therefore, where a lease was made to the king by a dean and chapter, and the king had assigned it over, after that the law came to be holden that the king was bound, the assignee had his lease made good to him in Chancery against the statute, because he could not know the law in a matter so dubious.

5 Co. 15 b; 11 Co. 75; Roll. Abr. 378; Roll. Rep. 151.

3. That all leases made according to 13 Eliz. c. 10, by any single corporation, if not warranted likewise by 32 H. 8, c. 28, must be confirmed by those who by law are to confirm the same.

Comp. Incumb. 417.

4. That these statutes of 1 Eliz. c. 19, and 13 Eliz. c. 10, are merely restraining, so that though bishops, and other ecclesiastical persons, might, with the confirmation of those required by law, have made any lease or perpetual grant, yet now no confirmation whatever will make them good for above three lives or twenty-one years.

Comp. Incumb. 419.

5. That no lease by an archbishop or bishop for three lives, or twenty-one years, made according to the exception of 1 Eliz. c. 19, is good to bind the successor, if it be not in every thing pursuant to the 32 H. 8, c. 28, unless it be confirmed by the dean and chapter; for leases for twenty-one years, or three lives, being only exempted and taken out from the general

disability imposed on bishops by the first part of the act, receive no sanction at all from that act, but as they are taken out to rest upon 32 H. 8, c. 28, and therefore though they are for twenty-one years, or three lives, yet if part of the land were not in possession, or if the old lease were not surrendered or expired within one year before the new lease made, or in any other respect, such new lease was not warranted by 32 H. 8, c. 28, to bind the successor, there must be the confirmation of the dean and chapter, because at common law such confirmation was necessary; and these leases not being warranted by 32 H. 8, c. 28, which is the only statute that enables bishops solely to make leases to bind their successors, remain at common law, and, by consequence, without confirmation are voidable by the successors as much as if they were made for one hundred years or lives.

10 Co. 60 b; Co. Lit. 45 a; Moore, 108.

6. That 13 Eliz. c. 10, hath been always construed largely and beneficially to prevent all inventions and evasions against the true intent thereof; therefore, where the statute says, master and fellows of any college, yet it hath been often held, that be the college incorporated by that name, or by the name of warden and fellows, or warden and scholars, or warden, fellows, and scholars, or master, fellows, and scholars, or master and scholars, or provost, fellows, and scholars, or by any other name of corporation, and be the college temporal for the advancement of the liberal arts and sciences, or merely ecclesiastical or mixed, that all these are within the restraint of this act. So, where the statute says master or wardens of any hospital, be the hospital incorporated by any other name, and be it a sole corporation, or corporation aggregate of many, yet the statute extends to them.

11 Co. 76, Magdalen College's case.

The next statute that made any alteration in these things was 14 Eliz. c. 11, which as to houses in cities and towns is as followeth: whereas in an act made 13 Eliz. c. 10, "there is one branch to avoid certain leases to be made by masters and fellows of colleges, deans and chapters of cathedral or collegiate churches, masters or guardians of any hospital, or by any other parson or vicar, or any other having any spiritual or ecclesiastical living; be it enacted, that the said branch, nor any thing therein contained, shall not extend to any grant, assurance, or lease of any houses belonging to any the persons or bodies politic or corporate aforesaid; nor to any grounds to such houses appertaining, which houses be situate in any city, borough, town-corporate or market-town, or the suburbs of any of them; but that all such houses and grounds may be granted, demised, and assured, as by the laws of this realm and the several statutes of the said colleges, cathedral churches and hospitals, they lawfully might have been before the making of the said statute, or lawfully might be, if the said statute were not; so alway that such house be not the capital or dwelling-house used for the habitation of the persons abovesaid, nor have ground to the same belonging above the quantity of ten acres. § 19. Provided that no lease shall be permitted to be made by force of this act in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than forty years at the most; nor any houses shall be permitted to be aliened, unless that in recompense thereof there shall be afore, with, or presently after, such alienation, good, lawful, and sufficient assurance made in fee-simple absolutely to such colleges, houses, bodies politic or corporate, and their successors, of lands of as good value, and of as great yearly value

at the least, as so shall be aliened; any statute to the contrary notwithstanding."

14 Eliz. c. 11, § 17.

Note; This statute makes no alteration of the statute 1 Eliz. c. 19, nor has any relation to it, but only to the statute 13 Eliz. c. 10, and therefore gives no power to bishops to let houses, otherwise than according to 1 Eliz. c. 19.

Comp. Incumb. 423.

Note also; That this statute need not be found by verdict, being a general law.

Cro. Eliz. 564.

By this statute it is expressly provided, that no lease shall be made of such houses in reversion; but by 13 Eliz. c. 10, no restraint being made of such leases, it was found necessary to provide against them by another statute, viz., the 18 Eliz. c. 11.

This act of 18 Eliz. c. 11, is a general law. 4 Co. 76, 120.

Which reciting, that since the making of the 13 Eliz. c. 10, divers ecclesiastical and spiritual persons, and others having spiritual or ecclesiastical livings, had from time to time made leases for the term of twenty-one years, or three lives, long before the expiration of the former years, contrary to the true intent and meaning of the said statute; enacts, "That all leases thereafter to be made by any of the said ecclesiastical, spiritual, or collegiate persons, or others, of any their said ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years is in being, not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void, frustrate, and of none effect." And by § 3, "that all and every bond and covenant whatsoever hereafter to be made for renewing or making of any lease, or leases, contrary to the true intent of this act, or of the said act made in the said 13th year, shall be utterly void; any law, statute," &c. Provided by § 4, "that this act, nor any thing herein contained, shall extend or be prejudicial to make frustrate or void any lease or leases heretofore made by any of the said spiritual or ecclesiastical person or persons, or any of them; but that the same, and every of them, are of the like force and effect as they, or any of them, were before the making of this present statute."

2 Roll. Abr. 465.

The statute of 18 Eliz. c. 11, has relation only to the statute of 13 Eliz. c. 10, to restrain leases in reversion where above three years of the first lease is then to come, but leaves the statute of 14 Eliz. c. 11, perfectly at large as to houses in cities, without making void such leases, or any bonds or covenants concerning them; for as to such houses the statute of 14 Eliz. c. 11, is a new law, and sets loose the 13 Eliz. c. 10, therefore where an action of covenant was brought against the dean of Lincoln and one of the prebendaries,(*a*) upon a covenant made by the dean and chapter, by their special names jointly and severally, to make a lease of a house in London, though it was argued [upon a general demurrer that both the lease and covenant were void upon the statute 18 Eliz. c. 11, yet it was adjudged that the covenant was good in law,] that statute extending only to 13 Eliz. c. 10, and not to the 14 Eliz. c. 11, which, as to houses in cities, repealed 13 Eliz. c. 10, and makes all leases thereof good, so as they do not exceed forty years, &c., and are not made in reversion, which was not prohibited

by 13 Eliz. c. 10. Also, the statute 14 Eliz. c. 11, forbids alienations of such houses, except there be full recompense given to the church at the same time, so as with such recompense they may alien such houses in fee, which was not permitted by 13 Eliz. c. 10. And it is (*b*) said the reason of repealing 13 Eliz. c. 10, as to houses in market towns, was to make those places more populous.

Hob. 269, Crane v. Taylor. ‖(*a*) There must have been separate actions. The action against two only of the covenantors is neither joint nor several.‖ (*b*) 1 Vent. 245.

But to avoid the force of those statutes of 13 Eliz. c. 10, and 18 Eliz. c. 11, and the clause making void bonds and covenants against them, a contrivance was set on foot to this effect: the dean and chapter of Windsor, in the 35th year of Eliz., made an agreement among themselves by lots to have an assurance of a lease to each of them, of certain part of the possessions of their church; and after the lots cast, whereby every one knew his own lease, they executed the assurance in this manner: the corporation enters into an obligation of 500*l.* to every canon that was to have a lease, and the payment limited to be within a short time before the expiration of the old lease in being, and the canon the same day entered into an obligation to pay the college 510*l.* at the same time, if they did make a lease according to a schedule annexed, which schedule was *verbatim* the demise agreed to be made; and it was farther proved, that the intent and agreement betwixt them was, that one 500*l.* should be stopped for the other 500*l.*, and that the corporation should have only the 10*l.* for the lease; which matter being disclosed in Chancery, the Lord Keeper Egerton made a decree, that the obligation of 500*l.* made by the dean and canons to each canon was void by 18 Eliz. c. 11, and in the same case a precedent was shown between Fry and the dean and canons of Wells, decreed 44 Eliz., in Chancery, which was thus: Fry gave to the dean and canons of Wells 1000*l.* and took an obligation of 2000*l.*, with condition to repay the 1000*l.*, and for non-payment brought an action of debt against the dean and prebendaries, and obtained a judgment, and made a defeasance thereof, that if they made a lease to him of land then in lease to Sir Amias Pawlett for fifteen years to come, then the judgment should be void; and the truth of the case was, that the 1000*l.* was paid, and 600*l.* thereof employed in payment of tenths due by the church; yet by the opinion of Popham, Anderson, and Periam, it was decreed in Chancery, that the judgment was void by 18 Eliz. c. 11, which makes void bonds and covenants for making leases against that statute of 13 Eliz. c. 10, but by way of arbitrament they awarded to Fry the 600*l.* that was paid and employed in the affairs of the church, and after the 43 Eliz. c. 9, § 8, was made to extend to judgments in such cases.

Moore, 789, Dean and Canons of Windsor v. Sir Gilbert Perwin.

Another statute concerning leases made by colleges in the two universities, and the colleges of Winchester and Eton, is 18 Eliz. c. 6, which adds one thing more, as followeth: "That no master, provost, president, warden, dean, governor, rector, or chief ruler of any college, cathedral church, hall, or house of learning in any of the universities of Cambridge and Oxford, nor any provost, warden, or other head officer of the colleges of Winchester or Eton, nor the corporation of any of the same, by what title, style, or name soever they now be, shall, or may be called, after the end of this present session of parliament, shall make any lease for life, lives or years, of any farm, or any their lands, tenements, or other hereditaments, to the which any tithes, arable land, meadow, or pasture doth or shall appertain,

except that the one-third part at the least of the old rent be reserved and paid in corn for the said colleges, cathedral church, halls, and houses, that is to say, in good wheat after 6*s.* and 8*d.* the quarter, or under, and good malt at 5*s.* the quarter, or under, to be delivered yearly upon days prefixed, at the said colleges, cathedral church, halls, or houses; and for default thereof to pay to the said colleges, cathedral church, halls, or houses, in ready money at the election of the said lessees, their executors, administrators, and assigns, after the rate of the best wheat and malt in the market of Cambridge, for the rents that are to be paid to the use of the house or houses there; and in the market of Oxford, for the rents that are to be paid to the use of the house or houses there: and in the market of Winchester, for the rents that are to be paid to the use of the house or houses there; and in the market of Windsor, for the rents that are to be paid to the use of the house or houses at Eton; is or shall be sold the next market day before the said rent shall be due, without fraud or deceit; and that all leases otherwise hereafter to be made, and all collatteral bonds or assurance to the contrary by any of the said corporations, shall be void in law to all intents and purposes; the same wheat, malt, or money coming of the same, to be expended to the use of the relief of the commons and diet of the said colleges, cathedral church, halls, and houses only, and by no fraud or colour let or sold away from the profit of the said colleges, cathedral church, halls, and houses, and the fellows and scholars in the same, and the use aforesaid; upon pain of deprivation of the governor and chief rulers of the said colleges, cathedral church, halls, and houses, and all other thereunto consenting. § 2. But this act, or any thing therein contained, shall not extend or be in any wise prejudicial to any lease to be made of a barn called Mouncken Barn, with a certain portion of tithes rising, growing, and being in the parish of Southweek in the county of Sussex, being parcel of the possessions of Maudlin College in Oxford, so that the term demised in and by the said lease exceed not the number of ten years from and after the feast of St. Michael the Archangel next coming. By § 3. This act shall not extend to any lease to be made by the president and scholars of the college of St. John the Baptist in Oxford, to any heir male of Sir Thomas White, late knight and alderman of London, founder of the said college, which lease shall be made according to the meaning of the foundation and statutes of the said college, of the manor of Fifield, and no other hereditaments."

In the construction of this statute it hath been holden, that it is a private act, because it concerns only those particular places; and therefore must be pleaded or given in evidence, or found by a jury, otherwise the court is not bound to take notice of it.

Leon. 306; Sav. 126.

Also it is said, that in a declaration upon a lease made by any of these colleges it ought to be showed, that the corn was reserved according to the statute; otherwise this may be good cause to move in arrest of judgment. But of this it may be doubted; for in the case itself, cited in Leon.(*a*) for that purpose, it appears that that exception was disallowed; for though it does not appear in the declaration that corn was reserved, yet it may be that it was reserved in the lease; and if not, yet the other party ought to show it; and therefore the exception to the declaration for not showing it was disallowed.

Leon. 306, 333; Sav. 129. (*a*) [In the case itself, Leon. 306, the objection was, that this was not found by the special verdict: in the reference to the case, Leon. 333, the

objection is stated to be as in the text; but that reference is faulty in another respect, inasmuch as it states the judgment to have been arrested for this reason.]

By the statute 22 Car. 2, c. 11, § 61, it is enacted, "That for ever hereafter the mayor, commonalty, and citizens of London may and shall have a market, to be kept three or four days in the week, as to them shall seem convenient, upon the ground now set out by the assent of the dean and chapter of the cathedral church of St. Paul, London, for a market-place within Newgate; and that the said dean and chapter shall make and give one or more lease or leases of the said ground to the said mayor, commonalty and citizens, and also of the wall of the said church-yard, abutting severally upon Paternoster-row and the Old Change, for the term of forty years, reserving the yearly rent of four pounds for the ground of the said market-place, and two-pence for every superficial foot of the ground or soil of the said wall, as it is now set out by the surveyors of the city and of the said dean and chapter, and so from forty years to forty years for ever, at the like yearly rent, and one year's rent, after the rates aforesaid, to be paid by way of fine for each of the said grounds respectively, upon the making every new lease thereof: which said lease and leases shall be good and effectual in the law, as against the said dean and chapter, and their successors, and all persons claiming by, from, or under them: and that no house, shed, or other building, shall stand, or hereafter be erected and fixed upon the said market-place, other than the market-house already built, without the consent of the said dean and chapter; any thing in this or any other act to the contrary notwithstanding." § 75. "And whereas the said parsons or vicars, or some of them, (within the said city of London,) are interested in several glebe lands or grounds, the which they cannot rebuild themselves, nor let such lease or leases as may be an encouragement to others to rebuild the same; be it enacted, That the said parsons and vicars, and every of them respectively, be empowered, and are hereby empowered to let such lease or leases of their said glebe lands or grounds, with the consent and approbation of the patron or patrons, and ordinary, for any term not exceeding forty years, and at such yearly rents, without fine, as can be obtained for the same."

Before we mention any cases, or make any observations on the foregoing statute, it may be necessary to take notice, that at common law if a parson had made a lease for years of his glebe land, to begin after his death, or granted a rent-charge in that manner, and such lease or grant were confirmed by the patron and ordinary, this would have bound the successor of the parson; because here was the consent and concurrence of all persons interested, and the lease or charge bound immediately from the perfecting of the deed by the parson, patron, and ordinary, though it was not to take effect in possession till after the parson's death; but now no confirmation whatever will make such lease or grant good against the successor, by reason of the statutes made to avoid them.

Dyer, 69 a; Hob. 7; Roll. Rep. 443.

If a person obtain a grant to build houses on church or college lands, and this be confirmed, (in case where confirmation is necessary,) yet this grant is no alienation against the statutes, but is only a covenant or license, and nothing else; for the soil remains in the grantor, and, by consequence, the houses built thereon are in him.

Hetl. 57, Mayor and Commonalty of Winchester's case. ‖Vide *contr.* Attorney-General v. Cholmley, Ambl. 310; 2 Ed. 304, S. C.; 7 Br. P. C. 34, S. C;

(E) Leases for Lives or Years, by Ecclesiastical Persons.

Lloyd v. Mortimer, 3 Gwill. 1060; Jones v. Snow, Ibid. 1199; O'Connor v. Cook, 8 Ves. 537.‖

If a parish be upon the design of enclosing lands, and a parson have tithes in kind, and common for beasts thereout, the chancery may decree him to take a quantity of ground elsewhere, in lieu thereof.

Comp. Incumb. 334.

So, where one had a lease of tithes in kind, it was ordered in Chancery, that a commission should go forth to set out other meadow and ground in lieu thereof. The reason of which cases seems to be, either for the prejudice the public might suffer, if such recompense in no case should be allowed, or for that the successor of the parson hath no injury thereby, being recompensed in other lands. *Sed quære*, why an act of parliament in such cases ought not to be procured? for it should seem the Chancery, as well as the other courts, is bound by all acts of parliament, which are positive laws, and has no liberty of breaking through them, upon any pretence of convenience or necessity, more than other courts.

Comp. Incumb. 334.

By the statute of 14 Eliz. c. 11, as appears before, all those who were restrained by 13 Eliz. c. 10, have liberty given them to alien houses in cities absolutely, so as at the time of such alienation there be a recompense in lands given to them, and their successors, of as great value as the houses aliened are. But this liberty of aliening, upon such recompense to be given, extends only to houses; for as to lands they have no such power, nor can they exchange them, to bind their successors, upon any recompense whatsoever. And *quære*, whether such house may be exchanged for lands of greater value, without license, against the statutes of *mortmain*?

Hob. 269; Noy, 5.

It is agreed, that corporations of mayor and commonalty, bailiffs and burgesses, and such other lay corporations, are out of all the before-mentioned statutes, and may make leases, and other estates, as they might ever have done.

Sid. 162.

It hath been adjudged, that a spiritual person not beneficed is not within the 21 H. 8, c. 13, which prohibits spiritual persons from taking leases to farm, &c., for life, years, or at will, in their own name, or in the name of any other person or persons to their use, &c.(*a*)

Deg. 135; Mich. 4 Car. 1, in Scaccar., Cragge v. Lampley. (*a*) ‖ The act of 21 H. 8, c. 13, is in this particular repealed by the 57 Geo. 3, c. 99, which consolidates and amends the laws relating to spiritual persons holding of farms, and by § 2, enacts, "that it shall not be lawful for any spiritual person having or holding any dignity, prebend, canonry, benefice, or any stipendiary curacy or lectureship, to take to farm for occupation by himself by lease, grant, words, or otherwise, for term of life or term of years, or at will, any lands exceeding in amount in the whole eighty acres, for the purpose of occupying, or using, or cultivating the same, without the consent in writing of the bishop of the diocese in which such dignity, canonry, prebend, benefice, stipendiary curacy or lectureship shall be locally situate, specially given for that purpose; and every such permission to any spiritual person to take to farm for the purpose of occupying the same any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which the permission is given; and every such spiritual person as aforesaid, who shall without such permission as aforesaid take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above the quantity of eighty acres so taken to farm the sum of forty shillings for each and every year during or in which he shall so occupy, use, cultivate, or farm such land contrary to the provisions of this act, to be recovered by and to the use of any person who may inform and sue for the same." By § 72, "In all cases wherein the term 'benefice' is used in this act, the said term shall be understood and taken to mean

benefices with cure, and no others, and to comprehend therein, for the purposes of this act, all donatives, perpetual curacies, and parochial chapelries."‖

A lease being made to a spiritual person against 21 H. 8, c. 13, and a bond or obligation taken for performance of covenants, the obligee brought an action of debt upon this bond, and had judgment; which proves that the lease was not absolutely void between the lessor and lessee, as the words of the statute are. And though in Dyer, where this case is reported, this is not mentioned to be any cause of the judgment; yet Periam in 1 Leon. held it to be the greatest cause of the judgment: and so it appears to have been adjudged in another place; for the statute inflicts a penalty of 10*l.* for every month that the clerk shall occupy such farm, and therefore it cannot be void; but the leases made void by that statute are only those which spiritual persons before that act, or after had, and before Michaelmas then next following were not bargained, sold, or granted away.

Dyer, 27, 28, 358 a; Leon. 309; 3 Keb. 436.

In an action upon 21 H. 8, c. 13, against a parson for taking farms, it is a good plea to say, *non habuit seu tenuit ad firmam contra formam statuti;* and the defendant may give in evidence, that the farm was for the maintenance of his house, &c., according to the proviso in the statute for that purpose.*

Bro. tit. *Action sur le stat.* 2. *Would not the general issue *nil debet*, be as good, if not more eligible?

Also, the writ grounded on this statute ought to be *qui tam* for the king and party; and therefore a writ, which demanded the whole, was ruled not to be good. But the statute need not be mentioned in the writ.

Bro. *Action sur le stat.* 4.

By another act, intituled, *An act for the erecting of hospitals, or abiding and working-houses for the poor*, it is (amongst other things) provided, That all leases, grants, conveyances, or estates to be made by any corporation so to be founded exceeding the number of twenty-one years, and that in possession, and whereupon the accustomable yearly rent, or more, by the greater part of twenty years next before the making of such lease, shall not be reserved, and yearly payable, shall be void.

39 Eliz. c. 5, § 2.

As to the persons who may be said to be seised in right of their churches, so as to be empowered by the statute of 32 H. 8, c. 28, to make leases for three lives, or twenty-one years, to bind their successors, it appears to have been adjudged, that a prebendary, though he be seised in right of his prebend, and not in right of his church, may yet within the equity of that act make leases for three lives, or twenty-one years, to bind his successor, observing the several qualifications required by the act; for the words of the act being general, all persons having an estate of inheritance in right of their church, with a special exception of parsons and vicars only, show the intent of the act to include and take in all but those so excepted. And Popham said, that in Dr. Dale's case, for a house near St. Paul's it was so adjudged, and so had been twice adjudged in his experience. And Fenner said, it was so adjudged in the case of a treasurer of a church. Besides, prebendaries are ecclesiastical persons, for they are admitted and instituted, and have *locum in choro, et vocem in capitulo.*

4 Leon. 51, Acton and Pritcher; Cro. Eliz. 350, Watkinson and Mann; Co. Lit 44 b; 3 Buls. 290; Bro. tit. *Leases*, 9; Palm. 105; Comp. Incumb. 325.

So, likewise, it hath been adjudged, that a chancellor of a cathedral church may make leases for twenty-one years, or three lives, within this statute, to bind his successor: so, of a treasurer, archdeacon, and precentor; for they are prebendaries, and more, for they are generally chosen out of the prebendaries, and have those dignities superadded or annexed. And though chancellors and treasurers are in some sort ministerial, yet are they not *inter minores ordines*, as the *ostiarii* and *vergers* are, who are only servants to carry candles and wax, keep the doors, &c., but the others are seised in fee in right of their church, &c., and have moreover these dignities superadded. But a case was cited to have been adjudged in the Exchequer, that leases made by the chanters of St. Paul's must be confirmed; for it was said, they are not properly chanters, but singing men only, and *minoris ordinis;* but the chanters, properly so called, precentors, &c., are *majoris ordinis;* as the bishop of Sarum, in right of his bishopric, is *præcentor Angliæ;* which shows it to be honorary, and a spiritual dignity.

Bisco v. Holte, Lev. 112; Sid. 158; Keb. 576; Ensden v. Dennis, Palm. 105.

If a parson, prebendary, mayor, dean, abbot, &c., or any other sole corporation make a lease for years, either upon these statutes, or at common law, though the lessor be under the age of twenty-one years, yet he shall not avoid such lease for that cause; for since they are admitted to exercise such offices or functions, though within age, they are likewise by law supposed capable of doing all things belonging thereto, as other persons of full age may do; and therefore such acts as are done by them in their politic capacity, which is subject to no age or infirmity, as the body natural is, are valid and effectual, notwithstanding their minority, which in such case is not material.

Bro. tit. *Age*, 64, 80. See 44 G. 3, c. 43.

‖ By 13 Eliz. c. 10, § 3, all leases made by spiritual persons, other than for the term of twenty-one years, or three lives, whereupon the accustomed yearly rent or more shall be reserved, are void. In order to render a lease valid under this statute, it must be made of land which had been previously let, or on which some rent had been reserved. Therefore a lease by a vicar for three lives of unenclosed and waste land, not proved to have been before let, was held not to be binding on his successor, although the lessee covenanted therein to enclose the land and pay a rack rent for it.

Doe v. Yarborough, 1 Bing. 24; 7 Moo. 258.

A new lease made by the warden and poor of an hospital, under their corporation seal, before the expiration of a former lease, to a lessee who had then only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding on the succeeding warden and poor of such hospital.

Grumbrell v. Roper, 3 Barn. & A. 711.

A lease by a rector of his glebe lands and other rectoral property, made between the years 1803 and 1816, while the statute 13 Eliz. c. 20 continued, is valid.

Doe v. Somerville, 9 Dow. & Ry. 100; and see tit. *Ejectment*, as to cases of forfeiture and waiver.

A demise by a parson of his benefice, made subsequent to 57 G. 3, c. 99, for securing an annuity, is void, it being in substance a charging of the benefice within the meaning of the 13 Eliz. c. 20.

Shaw v. Pritchard, 10 Barn. & C. 241; and see 1 Barn. & Adol. 673.‖

(E) Of Leases for Lives or Years by Ecclesiastical Persons.

2. *Of the Rules to be observed, and Qualifications requisite to the Perfection of Leases by Ecclesiastical Persons: And therein,*

Rule 1. Where an Indenture or Deed is necessary.

The first thing to be observed upon the several statutes before mentioned concerning leases is, that as well upon the statutes of the 1 Eliz. c. 19, and 13 Eliz. c. 10, as upon 32 H. 8, c. 28, the leases to be made by virtue thereof must be by indenture; for though the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10, do not require it, yet in that and all other qualities and properties required by the 32 H. 8, c. 28, (except concurrent leases only,) they must follow the pattern thereof. And (*a*) if the deed be indented, whether it begin *this indenture* or not, it is not material; for notwithstanding that, it is an indenture: on the contrary, if it be not indented, the calling it an indenture will not make it so.*

Co. Lit. 44 b; 3 Keb. 379. β A demise of incorporeal hereditaments must be by deed; a demise by parol of hunting or sporting, together with a messuage, is therefore void. Bird v. Higginson, 4 Nev. & M. 505; 2 Adol. & Ellis, 696; 1 Har. & Wol. 61. γ (*a*) 5 Co. 25, Stile's case; Co. Lit. 143 a, 229 a; Cro. Eliz. 472; 2 Inst. 672; 2 Roll. Abr. 22.——*If only the form of indenting the parchment, or paper, be wanting, that is not material, for it might even be done in court, and therefore no exception is now taken on such a trifling omission.

But the most observable thing under this head is, how far a parol lease or agreement by the parson with his parishioner or a stranger for his tithes shall be good, and how far and in what cases not; concerning which there are various cases and opinions in the books, many of which have no foundation from the statute, but stand entirely on their own bottom.

Comp. Incumb. 337, &c.

And herein all the books agree, that if a parson lease or grant over his tithes to a stranger for life or years, or even for a year, that such lease or grant must be in writing; and if it be not, it will be absolutely void. The reason whereof is, because tithes are things which lie merely in grant, and whereof no manual occupation can be; till they are actually collected, they are not things substantive, whereof the property can be changed by the notoriety of livery and seisin, or any actual taking of possession; but their whole essence before they are severed and divided consists only in notion and idea: therefore, without deed, the grantee or lessee can make no manner of title to them; for without that, there is nothing can be done to invest him with the property thereof, but the essence and substance of his title is to be derived from the deed, granting or leasing them to him. And for this reason it is that he must not only have a deed thereof, but must also in pleading show it with a *profert hic in curiâ;* for otherwise the court, which is to judge *secundum allegata et probata*, can no more adjudge his title good, than if he had no deed at all. But yet, (*b*) if such grant or lease be made of tithes without deed, and the grantee or lessee sue for them in the spiritual court, the defendant must plead that all the title the plaintiff has is by lease without deed; nor can he suggest this matter to ground a prohibition on; but he ought either to set out his tithes without regarding who hath the title to them, which will discharge him, or he may prescribe *in modo decimandi*, without making any severance, or may surmise that the tithes belong to J S, with whom he hath compounded to pay such a sum for all tithes.

Godb. 374; 2 Roll. Abr. 63; Cro. Eliz. 188, 249; Perk. § 62; Cro. Ja. 317, 613; Swadling v. Piers, 10 Co. 92; Leon. 23; 2 Browl. 11, 17; 2 Keb. 376. ‖ The case of Swaddling v. Piers, *supra*, in which in an ejectment for tithes the judgment was ar-

rested, because the plaintiff had not declared on a demise by deed, was denied to be law in Patrick v. Balls, Carth. 390, and 1 Ld. Raym. 136, S. C. by the name of Partridge v. Ball. In all events the omission is cured by the verdict.‖ (*b*) Leon. 23; Withy v. Saunders.

But, if a parson lease his rectory or parsonage for years, in this case the tithes and offerings will pass as incident to the rectory, though there be no deed, because the rectory is the principal, and the lease of that being good without deed, the tithes and offerings, which are but as part of or accessory to the rectory, must pass likewise, though they are not named. And some hold, that by such parol lease, the rectory and tithes will pass, though there be no house, but only the church and church-yard.

2 Roll. Abr. 63; Latch. 177, Bro. tit. *Incidents*, 7, tit. *Leases*, 15, 20, tit. *Grant*, 44, 59; Touchst. 229; Reynoldson v. Blake, 1 Ld. Raym. 193.

If a portion of tithes hath been long used with a chapel, a grant or lease of the chapel, with all the tithes thereunto belonging, is a sufficient description to pass the tithes, though generally a portion of tithes ought to be so named. But it does not appear whether in this case the grant or lease of the chapel were by deed or not.

Clayton, § 25, Bradford's case; Comp. Incumb. 798.

As concerning leases of tithes to the parishioner himself, who ought to pay them, there are variety of opinions in the books, how far such leases or agreements shall be good without writing, if they are made for the life of the parson, or for years, or for one year only, and how far, and in what cases, the assignee of the parishioner shall take advantage of, or be bound by such leases or agreements.

First then, most of the books agree, that if the parson, in consideration of such a sum then paid, or so much annually to be paid, by the parishioner, contract or agree by parol with him, that he shall retain his tithes, or shall be discharged of the payment of his tithes during the life of the parson, or for so many years as he shall be incumbent, this shall be void. And the reason given is, because, as a lease, this cannot be good without writing; and as a composition or agreement, it cannot be good, because it is uncertain at the making of it.

Cro. Ja. 137; Cro. Eliz. 188, 249; Noy, 121; Yelv. 94; 2 Leon. 29; 3 Leon. 357; Godb. 333; Palm. 377; 2 Brownl. 117; Lev. 24.

But yet some books hold such parol agreement for the life or incumbency of the parson to be good, and that if he demands tithes against it in the spiritual court, a prohibition shall be awarded to stay his suit.

2 Roll. Abr. 63; Godb. 333; Palm. 377; Hetley, 31, 107, 122.

It is held in several books, that though such parol agreement with the parishioner for the life or incumbency of the parson be not good, yet if it be for so many years certain, that this is good, though it be not by deed or writing; because it is in nature of a composition or agreement with the parishioner himself, who ought to pay them; and therefore if he sues in the spiritual court for tithes, against such agreement, a prohibition shall be awarded to stay his proceeding.

Yelv. 94; Noy, 121; 3 Leon. 257; 2 Brownl. 11; 2 Roll. Abr. 63; Godb. 354, 374; Cro. Ja. 668.

So it is likewise held, in pursuance of that opinion, that if the parishioner, after such agreement to retain his tithes for years, makes a lease of those lands to another, that the lessee also shall be discharged of the payment of tithes, because the discharge runs along with the land. But others hold the con-

trary; and that if the assignee be sued in the spiritual court, he shall have no prohibition, because by such parol contract no interest was transferred to the parishioner, but it was only a personal agreement between the parties themselves, and cannot extend to strangers.

Hetley, 31; Yelv. 94, Hawkes and Brothwith.

But all that hold such parol agreement for years to be good, hold, likewise, that, if the agreement were with the parishioner, his executors and assigns, there the executors or assigns of the parishioner, or even their lessee at will, shall take advantage thereof; and if they are sued in the spiritual court, shall have a prohibition, and compel the parson to take his remedy upon the contract; and that if the executors of the parishioner have made a lease over at will, they shall have their remedy over against the tenant at will, who came in under the benefit of such a discharge, and therefore ought to be contributory to the charge of it; and that granting such prohibition is a means to compel the parson to seek his true remedy.

2 Roll. Abr. 63; Cro. Ja. 668; Godb. 333; Palm. 377.

And yet we find some cases where such agreement was by deed with the parishioner and his assigns, that the parishioner, or assignee, being sued in the spiritual court, could have no prohibition, because, it was said, the covenant or agreement passed no interest in the tithes; and therefore, for breach of such covenant, the assignee had no remedy, but by action of covenant on the deed.

Aldresh's case, Palm. 36; Bennet v. Snell, Ibid. 377; Wellock's case, 2 Leon. 73.

Accordingly also several books held, that though such parol agreement for life or years, be not sufficient foundation for granting a prohibition, yet such suit in the spiritual court is a breach of the contract or agreement, for which the party may have remedy by action upon the case, upon the *assumpsit*, that he should hold discharged.

2 Leon. 29; Poph. 140; Fulcher v. Griffin, Godb. 333; Palm. 377; Roll. Abr. tit. *Conditions*, (U. a. pl. 9,) Brown v. Kinman.

So likewise it is held in several books, that though such parol agreement to retain for life or years be not good by way of passing an interest, yet if an action of debt be brought upon the statute 2 & 3 E. 6, c. 13, and the agreement be pleaded, and found for the defendant, that this shall be sufficient to bar the plaintiff of the treble damages given by that statute. So, if *nihil debet* be pleaded, and such agreement be given in evidence, it is sufficient to excuse the defendant from the penalty of treble damages.

Lev. 24; Raym. 14; Keb. 5, 21; 3 Keb. 24.

But the best opinion seems to be, that such parol agreement with the parishioner himself for more than one year is void: and even to make good this, it ought not to be entered into till after the corn is sown, because when once the corn is sown, then it is supposed to be *in esse*, and growing all that year, and then such agreement is in the nature of a sale of a thing or chattel actually *in esse*, which, like sales of other goods and chattels, needs no writing. But, if it be for more than one year, then it is in nature of a lease or grant of the parson's right or interest in the tithes, which, before they are *in esse*, consist only in notion; and therefore, to bind the parson, there ought to be a deed or writing; and if there be not, he may sue for them in the spiritual court, and shall not be tied up by a prohibition; and such parol grant or agreement for more years than one, is not only void for all the

years after the first, but in the whole; for the contract being entire, must be void in all, or good in all, and shall not be good and void by parcels.

2 Brownl. 17; Cro. Ja. 137; Hob. 176; Cro. Eliz. 188, 249; 2 Leon. 29; 3 Leon. 257; Owen, 103; Lev. 24; Raym. 14; Keb. 5; Godb. 333; Latch, 176; Noy. 89; Comp. Incumb. 340.

But a diversity seems to be taken in some books, between the parson or vicar, and the impropriator; the parson or vicar, they say, may lease his tithes for one year without deed, but the impropriator cannot, but it will be absolutely void; and it is said to be so ruled in Bennet and Spel's case; and in the case of Bellamy and Balthorp, where the lease for one year by the impropriator was holden void, being to a stranger of the tithes of the whole parish, by the opposition (*a*) that follows in saying, "*otherwise it is, if it be a lease of the tithes for a year, by the parson himself*," it must also be meant of a lease to a stranger, and not to the parishioner himself, who ought to pay them; and then it follows, that a parson or vicar may lease the tithes of their whole parish for one year to a stranger, without deed, which, it seems they may do, notwithstanding the books above mentioned, as is proved by constant practice: for perhaps it would be difficult and troublesome for the parson himself to collect all the tithes *in specie*, and it may be, several of the parishioners will not take leases, or agree or compound for their own tithes; and therefore, if the parson can find one who will take all that trouble off his hands, and leave him more at liberty to attend his cure, it seems reasonable he should be at liberty to set his tithes (as they call it) to such person for that year: and it would be too troublesome and unreasonable to expect, that upon every such yearly setting of his tithes, he should be forced to be at the expense of a new and formal lease in writing, especially since such setting or leasing is generally made about Easter, when the corn is actually growing, and in a good forwardness; and therefore such setting or leasing is rather a sale of chattel *in esse*, than a leasing or making over of a thing only in potentiality or idea; and such sale may be good without deed, as it would be of any other goods or chattels. And why the impropriator himself, in the like case, should not have the same power, seems hard to be accounted for; though, perhaps, in the case where this difference is taken, the vendee or lessee, strictly speaking, could not justify in trover against the owner, as by virtue of the lease *qua* lease without deed. But *quære*, if he had pleaded it as a sale for a valuable consideration, if that would not have altered the case, and made good his justification in taking them after they were severed?

Comp. Incumb. 338; Latch. 176; Noy, 89; Godb. 374. (*a*) [The argument from this opposition is drawn entirely from Noy's report. In Godbolt, the right of the *parson* to demise his tithes without deed is expressly negatived by Doddridge, J.; and in Latch no more is said, than that "the parson may discharge the parishioner of tithes, by parol, or lease the rectory, consisting of glebe and tithes, by parol for years."—Although in the discussion of this question in the cases in the text, a *parol* demise be generally used in opposition to one by *deed*, yet the question is not, whether tithes may be leased by *parol merely*, but whether they may be leased *without deed?* And the result of all the cases seems to be, that to pass an interest in tithes, to convey them to a stranger, a deed is absolutely necessary: but that a composition with the parishioner by way of retainer is good without deed. This latter point receives a confirmation, if indeed it want any, from the Kensington case, (Adams v. Hewitt, Dom. Proc. 1782;) for in that case the composition was without deed; but when the lords held that the notice there given to determine the composition was not a sufficient notice for that purpose, they necessarily admitted the composition itself to be valid, for there could be no question about the determination of a thing that was void.—In Keddington v. Bridgman, Bunb. 2, a difference is taken between a composition by way of retainer by parol,

and an agreement between the parson and his parishioners by parol; the latter, Baron Montague thought, would be good for years, being only an agreement that the parson would not sue his parishioners for so many years for tithes; the former, Bury and Price, Barons, held was good only for one year, being by way of contract. But where is the difference between the composition and the agreement in this case? The agreement on the part of the parson, is, that he will not demand tithes in kind for a limited time; on the part of the parishioners, that they will, during that time pay a sum of money in lieu thereof: but what else is this but a composition? But if a composition be good for one year, it may also be good for more than one year; for the objection is, that tithes, being an incorporeal hereditament, cannot pass without deed; if then they can be retained at all without deed, the more or less time for which they are agreed to be so retained cannot be material. See Noy, 121; Yelv. 96.]

A parson by parol, leased his tithe hay to the vicar, and the vicar paid the rent for the first year, but finding that the rent was more than the tithe was worth, refused to hold the bargain any longer; and being sued in the court of requests, (which was a court of equity,) and not pleading there any notice of his refusal, and sentence and decree being given for the parson, the vicar prayed a prohibition: it was agreed by the court, that if the vicar had received the profits, he was suable in the court of requests for the rent; and that if he had given notice of the refusal of the bargain, he had been discharged of the rent from the time of the notice given, because he had no remedy for the tithes, for that it was a void contract in law: and by Doddridge and Jones the case is the same, though he hath not given notice.

Latch, 115, Vicar of Anford's case; Palm. 423, S. C. by the name of Harris and Dilworthy.

By all the cases before mentioned, it appears how unsettled a point this is; and it is said now to be the constant practice of the courts at Westminster not to grant prohibitions upon the suggestions of such agreements, but to leave it to the spiritual court to determine; and if the party thinks himself there aggrieved, he may appeal. And this seems to hold still, as to such parol leases under the term of three years; for if they be above three years, then by the statute of frauds and perjuries, they are made to have the force only of leases at will; and if under three years, yet by that statute there must be yearly reserved two-thirds, at least, of the full improved value of the thing demised.

Comp. Incumb. 800.

Rule 2. When such Leases are to begin.

And herein the statute of 32 H. 8, c. 28, is different from the statutes of 1 Eliz. c. 19, & 13 Eliz. c. 10, for the 32 H. 8, c. 28, requires such leases to begin *from the day* of the making; but by the exceptions in 1 & 13 Eliz., they are to begin *from the making thereof;* and the diversity between these expressions will appear more fully by the following cases, which we will reduce under the following heads:

Co. Lit. 45; 5 Co. 6; Mountjoy's case, 3 Keb. 379. ℘ When there is no stipulation postponing the commencement of a lease, the day of the demise is inclusive, and is to be considered in computing the time of the commencement and termination of the lease. Donaldson v. Smith, 1 Ashm. 197.℘

1. *When such Leases as have no Date at all, or a void or impossible Date, are to begin.*

As to such leases as have no date at all, or a void or impossible date, as the 30th day of February, or the 40th of March, these must begin from the delivery, for there is no other certain *indicium* of the time of their taking

effect; and therefore the delivery, which is solemn and notorious, gives them from thenceforth a sanction, and binds the parties thereto.

Co. Lit. 46 b; 2 Co. 5; 2 Inst. 674; Yelv. 194; Hob. 140; 2 Roll. Abr. 21; Plow. 402; Roll. Abr. 848; Latch, 61.

2. *Such Leases as have a good Date, and are delivered on the same day; in what Cases the Day of the Date or Delivery is to be taken inclusive, and in what Cases exclusive.*

Where leases have a good date, and are delivered on the same day, *habendum* for twenty-one years, without saying for what time or when they shall begin; the leases in this case shall begin from the delivery; for the delivery makes the deed presently to be the deed of the lessor, and when nothing appears to the contrary, the lands contained in such deed shall pass to the lessee at the same time: for otherwise it would be the deed of the lessor to no manner of purpose; and there can be no reason to affix the time when the lands shall pass after one day more than another; therefore the delivery, which in this case makes it the deed of the lessor, shall likewise fix the *terminus a quo* the contract or lease shall begin.

Co. Lit. 46; Comp. Incumb.; Roll. Abr. 849.

So, if a lease be made for twenty-one years *habendum* from the making, or from the sealing and delivery, or from henceforth, this shall take effect from the delivery, whether there be a date or not; for the delivery gives sanction to the deed, and before delivery it is no deed at all; and, by consequence, from henceforth, or from the making, must relate to the time of its taking effect as a deed, and not from any other time. And in such case, the day of the delivery is taken inclusive; so that if such a lease be delivered the 20th day of June, the lease shall determine on the 19th day of June inclusive; and though the lease was delivered at four of the clock in the afternoon, or at any time after, on the said 20th day of June, yet that whole day shall be taken inclusive, to prevent clamour and uncertainty, by making fractions and divisions in a day. And yet in(*a*) Latch, where one declared of a lease of 25th March, *habendum abinde* for a year, rendering rent at Michaelmas and the Annunciation; and it was objected that the last Annunciation was not within the year; the objection was disallowed; for *abinde* shall be taken *a confectione*, and exclusive of the day.

Hob. 140; 5 Co. 1; 2 Co. 5 a; 2 Inst. 674; Moore, 879; Cro. Ja. 264; Cro. Car. 263; Dyer, 286, 307; Hob. 73; 2 Roll. Abr. 520. (*a*) Latch, 157, Alsop's case.

But, if a lease be made to begin *a die confectionis*, or *a die datûs*, there the day of the delivery, or the day of the date, is to be taken exclusive, because the preposition *a* is privative of the whole day before which it is prefixed: and therefore, if the lessee in such case should declare of an ejectment the day of the delivery or date, it would be against him, because that was before his title began.

5 Co. 1, 94; Co. Lit. 46; Moore, 879; Cro. Ja. 248, 340; Cro. Eliz. 766.

[So, where under a power to make leases for twenty-one years, or three lives, *in possession*, and not in reversion, a lease was made to one for three lives, *habendum* from the day of the date thereof, at the usual rent, &c., which lease had all the formal circumstances required by the power; it was holden, that this lease was not warranted by the power, for the demise being *habendum from the day of the date*, the lease was a freehold to commence *in futuro* and *therefore* void.

Denn v. Fearnside, 1 Wils. 176. See to the same effect, Freeman v. West, 2 Wils. 165; Doe v. Watton, Cowp. 189; Hotley v. Scott, Loft, 316.]

So, if a lease be dated and delivered the same day, and the *habend.* be *a datu*, or from the date hereof, it has been held, that the whole day of the date is to be taken exclusive; and by consequence, that from the date, and from the day of the date, are all one, if there be a date; but, if there be none, then the date shall be taken for the day of the delivery, and that whole to be excluded.

Co. Lit. 46 b; Dyer, 218; Moore, 41; 5 Co. 1; 2 Inst. 674; 2 Roll. Abr. 520; Roll. Rep. 137; 3 Buls. 203.

Yet the contrary to this has been adjudged in one case, where an ejectment was brought on a lease made 1 January, 3 Jac. *habend. a datu indenturæ prædict.*, and the ejectment was the same day, and after verdict for the plaintiff it was moved in arrest, &c., that this lease being made *habend. a datu indenturæ prædict.*, was as much as from the day of the date, as in 5 Co. 1, and then the ejectment being alleged the same day, is ill; but all the court resolved, that the date is the time of the delivery, and it differs from the time or day of the date, and therefore the ejectment being alleged *postea* the same day was good enough, and the plaintiff had judgment.

Cro. Ja. 135, Osbourn and Rider; Buls. 177, S. C.

So, where the archbishop of York, 6 Novem. 18 Eliz. by indenture, made a lease for twenty-one years *habend. a datu indenturæ*, no exception was taken to it, which proves that *a datu indenturæ* is the same as from the making, and that the day of the date, or day of the making, is not to be taken exclusive in such case, because then the lease would not be warranted by the exception in 1 Eliz. c. 19, which says, other than for three lives, or twenty-one years from the making, which is inclusive of the day of the making.

Moore, 107; And. 65, Fox v. Collier.

Ejectment by the successor of a prebendary upon a lease made for life *habend. a datu;* and if this should bind the successor, was thrice argued, and for the plaintiff urged, that it should not; that *a datu* is all one with *a die datûs*, and then livery being made the same day that the indenture bears date was void, because it cannot expect. 2. That this was a lease in reversion, not being to begin in point of interest till the day after the making or date, which is not good by 13 Eliz. c. 10, for here the day of the date is excluded. But it was answered and resolved, that in propriety of speech *datus*, or dated in English, is the very act of the delivery of the deed; for *datus* in Latin, being taken participially, is given or delivered in English; and *datus* substantively taken in Latin, is the date of the delivery in English, which signifies all one; and in Clayton's case, the six months were taken the most extensively to make good the deed by enrolment, but to make a word of an equivocal sense as this is, (which may be taken either inclusive or exclusive of the day of the delivery or date of it,) to make the lease void is unreasonable, therefore it shall rather be taken in such sense as may make it good, *ut res magis valeat quam pereat;* and therefore it was adjudged good by the three puisne judges, the Chief Justice Treby dissenting, though he was at first of the same opinion, and so also was Powell, but afterwards changed it for the defendant; which shows the nicety of these distinctions.

Hatter v. Ash, 3 Lev. 438; 2 Salk. 413, S. C.; Ld. Raym. 84, S. C.

[The distinction made in the preceding cases, and in several of those in the next division, hath been levelled by the decision in the Court of King's Bench in Pugh v. Duke of Leeds. In that case, a lease under a power to make leases in possession was made to commence "*from the day of the*

date," and on a case made for the opinion of the court on the validity of that lease as a lease in possession, it was holden to be good, upon the ground that the particle *from* might, in the strictest propriety of language, be taken either inclusive or exclusive:] ‖ that the parties necessarily understood and used it in that sense, which made their deed effectual: and that courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them, more especially where the words themselves abstractedly may admit of either meaning.‖

Cowp. 714. This decision, it should be remarked, hath not been generally assented to in Westminster-hall. The reader will find it examined with painful diligence by Mr. Powell, in his Essay on the Learning relating to the Creation and Execution of Powers. ‖ In the case R. v. Inhabitants of Gamlingay, 3 T. R. 513, upon the word "from" in an indictment, and in which this case of Pugh v. Duke of Leeds was cited, Lord Kenyon said, it was not applicable to the case before him, and that it must be remembered, that though he believed that case was rightly decided, the contrary determination had before been made by all the judges. And Ashhurst, J., observed, that the case of Pugh v. Duke of Leeds was properly decided, but that it turned on the construction of a contract between two persons where their intention was to be considered. See also *Ex parte* Fallon, 5 T. R. 283; Dowling v. Foxall, 1 Ball & Beatty, 193.‖

3. *Such Leases as have a good Date, but are not delivered till a Week or Month, &c., after, when they are to begin, and how the Declaration on such Leases is to be framed.*

And it is to be observed, that every deed shall be intended to be delivered on the same day it bears the date, unless the contrary be proved; and it is the best course (as the law intends) to deliver it on the same day that it bears date: therefore, where in an ejectment the plaintiff declared of a lease dated 1 Novem. *habend. a confectione*, or *a die datûs, sigillationis et deliberationis indenturæ prædict.*, and laid the ejectment 2 Novem. though it was objected that the declaration was not good, because it did not appear when the lease was sealed and delivered, and it might be delivered long after the date; and the course is to say, that such a day and year *dimisit per indenturam*, bearing date the same day and year; yet it was adjudged, that the declaration was good, because when he declares that he let by indenture of such a date, it shall be intended to be delivered on the same day, unless it be shown with a *primo deliberatum* at another day; and he, who pleads a deed of such a date, cannot by replication, or other pleading, maintain it to be delivered a another time, for that would be a departure.

2 Inst. 674; Cro. Ja. 264; Cro. Eliz. 773; Cro. Ja. 646; Dyer, 167 b, 221 b.

But, if the truth be that the lease was sealed and delivered at another time than it bears date, then the plaintiff ought to show it in his declaration; or the defendant, if it be material for him, may show in his plea the delivery at another time than the date, and traverse, that it was delivered on the day it bears date.

Ofley v. Hicks, Cro. Ja. 264. ‖ Under a power to grant leases in possession, and not in reversion, a lease, though dated back, and on the face of it appearing to commence *in futuro*, if not in truth executed till at or after the time it is expressed to commence, is a valid execution of the power, and may be supported as a lease in possession: for a deed takes effect from its execution, and not from the date of it, and therefore, if the time of the execution can be proved, the lease cannot be defeated. Campbell v. Leach, Ambl. 740; Doe v. Day, 10 East, 427; Hall v. Cazenove, 4 East, 477; and extrinsic evidence is admissible to show when the lease was actually executed. Doe v. Robson, 15 East, 32.‖

Accordingly, an ejectment was brought of a lease made 12 Decemb., *habend. a primo die*, and upon not guilty, the jury found the lease dated 1 Decemb. *habend.* from henceforth, but delivered 12 December, which

proves that where the date and delivery were at several times, they ought to be distinguished in the declaration. But the question therein was, whether this lease was the same whereof the plaintiff declared, that is, whether being limited to take effect from henceforth, the day of the date should be taken exclusive, so as to warrant the declaring of a lease *a primo die*? for it was objected, that this did not warrant the declaration, because from henceforth, and from the day of the date are several commencements, the one beginning on the day it is sealed and delivered, the other the day after. But it was resolved *per curiam*, that they are both one, being a computation up to a time past; and when the lease is sealed at a day after the date, whether it be limited to begin from henceforth, or from the day of the date, yet in pleading it shall be alleged to begin from the day on which it is dated. And Serjeant Moore took this diversity in another case, that if one leases land in interest, *habend. a datu*, there, the day of the date shall be taken inclusive, the date and delivery being both on the same day; but where it does not begin in interest at the time it is dated, as where the date and delivery are several, and the *habend.* is *a datu*, there, the day of the date shall be taken exclusive, because it is to commence from the date, that is, from the day of the date, for the date in that case can mean nothing else, since it is not delivered till after; and therefore the computation of its commencement being from a day backwards, that whole day shall be excluded. And perhaps this diversity may reconcile the cases of Clayton, 5 Co., and Osbourn and Rider, Cro. Ja. 135, before put; for in Osbourn's case the lease was made the same day it was dated, and so began then in interest; but the case cited in Clayton's case, to prove the date and the day of the date to be all one, was, from a computation backwards upon the statute of enrolments, which appoints them to be enrolled within six months after the date; and there it was adjudged that a deed enrolled upon the last day of the six months, accounting the day of the date exclusive, was yet well enrolled within the statute; but this, as has been observed, was a computation backwards, and that from the date, and from the day of the date, is all one, is only an *unde sequitur* of my Lord Coke's own, from the case of the enrolment; and in his 1 Inst. 46 b; where he mentions it again, he cites for it Clayton's case and Dyer, 286, where that case of the enrolment is reported: And though the case of Bacon and Waller, 3 Buls., was adjudged according to Clayton's case, that the date and day of the date were all one, and the day to be taken exclusive; so that a lease there dated and delivered 26 May, *habendum* from the date, did not begin till 27 May; and it appears both by(*a*) Buls. and Rolls, that the judgment therein given was founded on the case of Llewelyn and Williams, where the date and day of the date were held all one; yet, as it appears, the reason of that case was upon a computation from a time past, and that the lease therein did not begin in point of interest upon the day it bore date, and, by consequence, was no warrant for the judgment that was given in Bacon and Waller's case; and then that judgment being founded on the authority of the former case, can be of authority no farther than as it agrees with that former case, and then it is of none at all, because, as appears before, it varied materially from it; therefore, the diversity taken by Serjeant Moore, which is likewise warranted by the case of(*b*) Osbourn and Rider, seems to remain unshaken, and to be the true distinction for settling the books.

Llewelyn v. Williams, Cro. Ja. 258. (*a*) Bacon v. Waller, 3 Buls. 203; Ro. Rep 387; 2 Ro. Abr. 520, pl. 4, S. C. (*b*) Cro. Ja. 135.

(E) Of Leases for Lives or Years by Ecclesiastical Persons.

In ejectment the plaintiff declares of a lease 7 Jan. by indenture dated 6 Decemb. *habend. a die datus indenturæ prædict.*, and gave in evidence a lease dated 6 Decemb. *habend a tempore confectionis indenturæ*, and it was held not the same lease whereof the plaintiff declares, because, says the book, *a die datûs* excludes the day. But a better reason seems to be, because it does not agree in point of description with the lease whereof he declares; for if the declaration had been of a lease 7 Jan. *habend. a* 6 *die Decembris*, then by the authority of Llewelyn's case this had been good; yet being upon a computation from a time past, the day of the date must be pleaded exclusively; but when he declares of a lease 7 Jan. by indenture dated 6 Decemb. *habend. a die datûs*, this must be intended a description of the lease as it is comprised in the indenture; and when he afterwards shows an indenture, containing a lease *habend. a tempore confectionis*, this is a description of another lease, and not of that which was to begin *a die datûs*. And this likewise seems to be the reason, that in another case, where the plaintiff, in bar of an avowry, pleaded a lease 30 March *habend.* from the feast of the Annunciation next before, and upon traverse of the lease *modo et forma*, the jury found a lease to the plaintiff on the 25th day of March for one year from thence next ensuing; and though held not to be the same lease the plaintiff pleaded, because this begins on the 25th of March inclusive, and the lease pleaded from the 25th of March exclusive, yet the plaintiff had judgment, it being found in substance that the plaintiff had such a lease as by force thereof he might have common the 11th of April following, &c., but agreed clearly, that if he had declared so in ejectment, it would have been against him, because there he demands and recovers the term, and therefore must set out his title truly, which appears to have been by a lease dated and executed the 25th of March, *habend.* from thenceforth; and therefore a lease executed but the 30th of March, and dated the 25th of March, *habend.* from thenceforth, could not be the same, not agreeing in point of description. But, if the truth had been that the lease had been executed but the 30th of March, then, it seems, he might have declared of a lease then made *habend.* from the 25th day of March, being a computation from a time past, though the lease were dated 25th March, *habend.* from henceforth, because it did not then begin in interest. But *quære*, if the better way in all these cases, to prevent any mistakes, be not to declare of a lease dated such a day *habend.* from henceforth, or from the making, or from the day of the date, or day of the making, &c., exactly as it is in the lease,* with a *primo deliberat.* such a day, if the truth be so, rather than for the lessor to take upon him to judge when the day shall be taken inclusive, and when exclusive, and so as in this case to declare of the *habend. a* 25 *die Martii*, when in truth the *habend.* was worded from henceforth? though if the lease had been executed but 30 March, it seems that if he had declared of a lease 30 March *habend. a* 25 *March*, this had been good, for the reasons beforementioned.

Cro. Ja. 647, Scavage v. Parker; Hob. 73; Moore, pl. 1188, Pope v. Skinner

* This is now the form constantly used by good pleaders.

A lease in reversion was made to commence *ad festum Annunciationis* after the former lease should be determined; and it was objected, that it ought to be *a festo Annunciationis;* yet the court held it to be all one, for that there shall be no fraction of a day; but *quære*, how this would have

made a fraction of a day? for there seems to be a whole day's difference, *ad* including the feast-day, and *a* excluding it.

Cro. Car. 502, Lloyde v. Gregory.

A parson leases by indenture the tithes of 200 acres of land to the owner of the land, of which he, and his wife, and his heirs were seised, *habend.* from *Mich.* next following to him and his heirs, during the life of the parson: the lessee dies, and his wife had the 200 acres for her jointure, and married B, who let the two hundred acres to the plaintiff; the heir of the first husband grants also to the plaintiff the tithes of those lands at will, and he being sued for tithes by the parson against his own lease, brought a prohibition: but a consultation was after granted. For by Fleming, C. J., Fenner, and Williams, the lease being for life, and to begin at a day to come, is void; for though tithes are spiritual, and are not extinct in the land, yet in the conveyance of them they ought to follow the nature of land, rent, or other hereditaments *in esse*, which cannot be granted for life at a day to come. But Yelverton and Croke thought, that this lease being to the owner of the land, did not enure by way of *interest*, but by way of *discharge;* and a discharge may well commence at a day to come; as to be discharged from suit to a mill, or the like. But by the C. J., and Williams, as the plaintiff hath pleaded, "by force of which the lessee was seised of the tithes to him and his "heirs for the life of the parson," they, as judges, could not intend it to be otherwise. And by Fleming, C. J., it cannot enure by way of discharge, because there are no such words in the lease; and it was more for the lessee's benefit to have it by way of interest than by way of discharge; for then this would be such a privilege annexed to the land as could not be granted over; whereas here the wife was owner of the land, but the son and heir of the lessee took upon him to be owner of the tithes; which could not be, if the first lease had enured by way of discharge. And Yelverton inclined, that the pleading of the lease, and of the seisin by force of it, was not good.

Yelv. 131, Edmonds v. Boothe.

A lease of houses within 14 Eliz. c. 11, may be made for years from a time to come; for that statute does not require them to begin from the making, or day of the making, but only that they do not exceed forty years from the making.

Poph. 9, Thomson v. Trafford.

And it is said, that a lease for lives being avoided at common law, for that it was made to commence from a time to come, an injunction was granted out of Chancery to continue possession.

Comp. Incumb. 803, cites Bury v. Conisby, 23 Eliz. Toth. 180.

A lease to three for their lives, *habend. a die datûs*, is good, if livery be made after the day of the date, because till livery nothing passes, and being made after the day of the date, it may then operate presently: *secùs*, if livery had been made on the day of the date, because then the operation of it must have been suspended till the next day, which the law will not allow.

Moore, 637, 759.

[The dean and chapter of Worcester being seised in right of their church of one of the manors of Charlton, by indenture bearing date the 26th November, 1750, for a valuable consideration granted the said manor, of which the premises in question were part, to the lessor of the plaintiff, to

hold to him and his heirs from the day of the date thereof for the lives of three persons, under the yearly rents, &c. In the lease, power was given by the dean and chapter to their attorney, to take possession of the premises, and to deliver seisin thereof to the lessee, *according to the tenor, effect, and true meaning of the said lease;* and in pursuance of such power, seisin was delivered of the premises by the attorney to the lessee, on the 28th day of May, 1751. The question was, whether this lease, being made to commence from the day of the date thereof, and seisin delivered the 28th of May following, was good? The court held that it was: that till livery was made, the freehold remained in the dean and chapter: that they would presume that the power given to the attorney was to make livery at *any* day subsequent to the lease, which, they said, was the true meaning of the deed; for by the warrant of attorney to deliver seisin in the present case, the deed should be substantiated by the livery.

Freeman v. West, 2 Wils. 165.

But, if a man make a lease of land to hold for life from the day of the date, and make livery by attorney the same day *secundum formam chartæ*, this is a void lease.

Bull v. Wyatt, 1 Roll. Abr. 828; Butler v. Fincher, 2 Bulstr. 302; 1 Roll. Rep. 229.]

‖ Where a deed has no date or an impossible date, as the 30th of February, and in the deed reference is made to the *date*, that word must be construed to mean *delivery;* but if it has a sensible date, the word date occurring in other parts of the deed, means the day of the date, and not of the delivery; and therefore, in covenant on an indenture, dated the 24th of December, 1822, whereby plaintiff leased to defendant a house and premises for ninety-seven years, subject to an agreement for an underlease to A, for twenty-one years, and the defendant covenanted that he would, within twenty-four calendar months then next after the date of the indenture, procure A to accept a lease of the premises for twenty-one years from Christmas day, 1821; and that in case A would not accept the lease, that he, defendant, would pay to plaintiff a certain sum of money; it was held, that the deed took effect from the day of the *date*, and that A, not having accepted the lease, defendant was liable to pay the stipulated sum of money at the expiration of twenty-five months from the *date* of the deed, although it was *delivered* some time subsequent to the date.

Styles v. Wardle, 4 Barn. & C. 908.

A lease purported on the face of it to have been made on the 25th of March, 1783, *habendum* to the lessee from the 25th of March now last past, for thirty-five years. There was evidence to show that the lease was not executed until after the 25th of March, 1783. Held, that it took effect from the time of the delivery, and not of the date; and consequently, that the term commenced on the 25th of March, 1783, and not on the 25th of March preceding the date of the deed.

Steele v. Mart, 4 Barn. & C. 272; 6 Dow. & Ry. 392.‖

Rule 3. Within what Time the old Lease is to be surrendered; and herein of concurrent Leases.

Another rule to be observed in the making of leases upon these statutes is, that if there be an old lease in being, it must be surrendered, expired, or ended within a certain time after the making of the new lease; and such surrender must be absolute, and not conditional; (*a*) for then the intent of the

statute might be easily evaded, by setting up all such old leases again, upon breach of the condition.

Co. Lit. 44 b; 5 Co. 2; Moore, pl. 1084. (*a*) [The lessor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the above proviso in the stat. 32 H. 8. His objection was, that the surrender made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone, but the lessee reserved a power of setting it up again. But the court, after two arguments, gave judgment for the defendant; this being within the intent of the statute, which was, that there should not be two long leases standing out against the successor. Here, the new lease was made within the week, and from thence it became an absolute surrender both in deed and law. And the whole was out of the lessee, without further act to be done by him. In the proviso in this act, there is the word *ended* as well as surrendered; and can any one say the first lease is not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him. Wilson v. Carter, 2 Str. 1201.]

And such surrender may be safely made either to a corporation sole or aggregate, upon their promise to make a new lease; for if any single person, or sole corporation make such promise, and refuse after to make the lease, an action on the case shall lie against them; and if such promise be made by a corporation aggregate, though no action will lie against them, because being a corporation they cannot be bound without deed, yet the person who surrendered may sue in equity, and compel them to a specific performance of their promise, and to make a new lease: but such suit must be against some of them by name, as the dean in particular, and the chapter of the same place generally; and such suit in equity seems the best way in case the surrender was made to a sole corporation or single person, because in the action at common law, damages are to be recovered only, but no new lease made, as will be decreed in equity. But now since the statute of frauds and perjuries, which requires all surrenders to be in writing, it is usual to have a covenant from the person or corporation, to whom the surrender is made, that they will within such a time make a new lease under such and such terms. But, as it seems, that statute does not extend to surrenders in law, by the taking of a new lease in writing.

Roll. Rep. 82; Sir George Frevil v. Ewebank, Comp. Incumb. 812, 813; 29 Car. 2, c. 3.

The statute of 32 H. 8, c. 28, provides that such old lease shall be expired, surrendered, or ended within one year next after the making of the new lease; and the statute 18 Eliz. c. 11, enacts, that all leases to be made by any of the ecclesiastical, spiritual, or collegiate persons, or others, within 13 Eliz. c. 10, of any lands, &c., whereof any former lease, &c., for years is in being, and not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void, and of none effect.

And a surrender in law by the taking of a new lease, either to begin presently, or at a day to come, seems a good surrender within these statutes; for by taking such new lease, though it be to commence at a future day, the first lease is presently surrendered and gone, and shall not continue good till the day on which the second lease is to commence; but by acceptance of such second lease the first is immediately determined; because both leases cannot consist together, and the first cannot be dissolved or surrendered in part, and therefore must be surrendered for the whole.

Poph. 9; Plow. 106; Comp. Incumb. 811.

(E) Of Leases for Lives or Years by Ecclesiastical Persons.

One Small being possessed of the manor of Paddington by a lease for years from a bishop, the bishop made a lease to another for three lives, and before livery the tenant surrendered his former term; it was held, that this surrender was made in time, and the second lease good, because it was no complete lease till livery, and before that, the first lease was surrendered and gone.

Degg. 130, Small's case.

And this rule, that if there be any old lease in being, it must be surrendered, expired, or ended within the times before-mentioned, holds good not only when bishops, and other sole corporations, mentioned in 32 H. 8, c. 28, make leases by authority of that statute for twenty-one years, or three lives, without the assent or confirmation of others; but also when any spiritual or ecclesiastical corporation sole (other than bishops) do make such leases, though with the consent and confirmation of those who by law are to confirm the same; and also when any spiritual, ecclesiastical, or collegiate corporation aggregate, make such leases whereto no confirmation of others was ever requisite. For the better understanding whereof, it will be necessary to consider the learning of concurrent leases, and what persons, upon the several statutes before-mentioned, are capable of making them, and in what manner.

Comp. Incumb. 806.

To begin then with bishops: it is to be observed, that at common law, bishops, with the confirmation of their dean and chapter, might have aliened the possessions of their church for ever, or have made leases for what term of years they thought fit; and this would have bound their successors, though it were for 5000 years: but a bishop, without such confirmation, could not have made a lease to bind his successors, though but for one year; both of which being great mischiefs, were remedied by 32 H. 8, c. 28, and 1 Eliz. c. 19. For whereas before 32 H. 8, c. 28, bishops could not make any lease at all to bind their successors, unless it were confirmed by the dean and chapter; now that statute enables the bishops alone, without such confirmation, to make leases of all or any of their possessions, so they do not exceed three lives, or twenty-one years; but, if bishops had a mind to make leases or grants for any longer term, or in any other manner than this statute warranted, then such leases or grants were out of the protection of this act, and remained perfectly at common law, as they were before, and, by consequence, must have the like confirmation of the dean and chapter, in order to bind the successor, as they must have in all cases at common law. And because it was found by experience, that many bishops made an ill use of this power, and chose to make leases for long terms of years, rather than keep within the bounds this statute hath prescribed them, and sometimes to make absolute alienations of their possessions, and then get the dean and chapter to confirm such leases and alienations, whereby the successor was oftentimes left without sufficient to keep up hospitality, or sustain his dignity; therefore, to remedy this mischief(*a*) was the statute of 1 Eliz. c. 19, made, which makes void all gifts, grants, &c., or estates of any honours, castles, manors, lands, tenements, or hereditaments, being parcel of the possessions of the bishopric, (other than for twenty-one years, or three lives,) so that now, after this statute, no confirmation whatever will make good any bishop's lease, if it exceed that term, because then the statute makes it void, and, by consequence, not capable of receiving any

sanction from a confirmation. But upon these statutes was the concurrent lease invented, which has generally obtained, and been held good, and is in this manner.

Fox v. Collier, Moore, 107; Anders. 65, S. C.; Leon. 36, S. C. cited; 3 Leon. 131; Palm. 464, 466, 467; Latch, 241; Leon. 59; Co. Lit. 45; Ley, 78. (*a*) ‖ This mischief was particularly to be apprehended just at this time, the sees having been filled by Mary with catholics, who foreseeing the revolution in religion which upon the accession of Elizabeth was about to happen, and that their interests in their preferment must soon be determined, would, it was to be expected, employ the power they then possessed in securing a provision for themselves out of the revenues of their churches. This was, no doubt, the *immediate* reason for this disabling clause in the act. Ley, 78; Latch, 241, 242; Palm. 467. ‖

If a bishop solely makes a lease for twenty-one years according to the statute of 32 H. 8, c. 28, and within four or five years or more, before the end of that lease makes a new lease to another for twenty-one years, to begin from the making, &c. this second lease, if it be confirmed by the dean and chapter, and be in every thing else pursuant to the exception in the 1 Eliz. c. 19, is good as a concurrent lease, for these reasons: 1. Because such lease, though it be not good within the 32 H. 8, c. 28, by reason the first lease is not surrendered or expired within a year after the making thereof; yet being confirmed by the dean and chapter, it remains a good lease at common law, and then if it be not void within the exception of 1 Eliz. c. 19, the successor shall be bound. And that it is not void within that statute, appears both from the letter and meaning of the exception; for the words are, *other than for twenty-one years, or three lives, from such time as any such lease shall begin;* now this second lease does not exceed twenty-one years from the time it begins, being for twenty-one years only from the making, and so within the express words of the exception. 2. This is not void within the meaning of the exception, because for so many years as were to come of the first lease this is good only by estoppel, and not in interest;(*a*) for the second lessee can have no benefit of it so long as the first lease endures, and then against the successor there is in effect no more than a lease for twenty-one years; for the second lease, being in effect void for all the years that are to come of the first lease, those years that are to come of the first lease, and those that will then remain of the second lease, make in all no more than twenty-one years at one time, and so not against the meaning of that exception. 3. Such second lease is so far from being prejudicial to the successor, that it is rather for his benefit,(*b*) for now he will have the rent reserved on the first lease during the residue of that term, and may also at the same time recover the rent reserved upon the second lease, being only for years, because the lessee is estopped to say he did not take such lease under such reservation: and so the successor will have two rents instead of one; though if the second lessee should enter, and be evicted by the first lessee, this would cause a suspension of the rent reserved on the second lease. However, the successor suffers no prejudice, because though he cannot distrain for the second rent during the continuance of the first lease; and though the re-entry of that first lessee should amount to an attornment, and give the rent thereon reserved to the second lessee; yet the bishop, or his successor, may always maintain an action of debt against the second lessee for the rent, and so will in all events be sure of one rent.

(*a*) ‖ A lease in being is only that in possession. A *concurrent* lease is not a lease *in esse*. It operates only by estoppel. It passes no interest during the former lease. The

statute of 18 El. meant to restrain leases in reversion; therefore by lease *in being*, the legislature meant a lease in possession. Per Yates, J., in Wilson v. Sewell, 1 Bl. Rep. 626. (*b*) This benefit, as Mr. Sugden well observes in his Treatise on Powers, 599, is no other than a fruitful field of litigation.‖

But this lease, though it be not either against the letter or meaning of the exception in 1 Eliz. c. 19, yet since it is not warranted by 32 H. 8, c. 28, it must be confirmed by the dean and chapter, as before the 1 Eliz. c. 19, all leases not pursuant to 32 H. 8, c. 28, must have been to bind the successor: and such confirmation must be in the (*a*) life of the bishop who makes it.

10 Co. 60 b; Moore, 109; Co. Litt. 45. (*a*) But one book says, that confirmation of such concurrent lease in the vacation of the bishopric, is good enough. 4 Leon. 78. *Quære?*

But after such lease for years, the bishop cannot make a lease for three lives to be good by way of concurrent lease, though it be confirmed by the dean and chapter; but such second lease, whether it be made to begin presently, or by way of lease or grant in reversion, and attornment upon it, is against the exception in the 1 Eliz. c. 19, and, by consequence, shall not bind the successor. For the words of the exception are, *other than leases for three lives, or twenty-one years* in the disjunctive; so that there ought to be only one, or only the other in being at a time against the successor, and not both together: for which reason also, after a lease for three lives, the bishop cannot make a lease for twenty-one years to bind the successor, though with the confirmation of the dean and chapter, because then there would be both a lease for three lives and twenty-one years in being at a time, which that statute does not allow of. And if the lease in reversion for three lives should be good as a concurrent lease, then would the successor have no remedy for the rent thereon reserved during the first lease. Not by distress, because the possession was only a pledge for the rent reserved on the first lease. Not by action of debt, because that does not lie for rent reserved on an estate of freehold during the continuance thereof. (*b*) Not by assize, because he had no seisin of it; and though *ex vi termini* the rent is payable, because after the lease for years determined the lessor may distrain for all arrears; yet that is only a possibility or contingency; for the lease for years may outlast the three lives, and then they, by reason of their reversionary interest, having the present rent of the lessee for years, if they all die before the determination of the lease for years, the bishop and his successors will lose all that rent, and so have nothing to maintain hospitality, or sustain the dignity of their sees, which this statute of 1 Eliz. c. 19, intended chiefly to provide for. And though the first lease were for three lives, and the second only for twenty-one years, yet that will not bind the successor; because though an action of debt might be maintained against the lessee for years for the rent reserved on his lease during the lease for lives, yet such lease for lives and years at the same time is against the words of the exception of 1 Eliz. c. 19, which are in the disjunctive. It may also happen that the lessee for years is worth nothing, and then if the three lives should outlive such subsequent lease for years, the successor of the bishop would lose all that rent, and so suffer in his revenues, against the design and meaning of the act; which proves, that the concurrent lease holds place only where *both are for years;* so that the certain determination of the first, and commencement of the second are known immediately upon the making thereof, and the successor will in all events be sure of a remedy by way of distress, for the one rent and the other, as they respectively commence; and also by

action of debt or covenant upon the contract in the meantime, if such concurrent lease should be construed to pass a reversionary interest, and entitle him to the rent reserved upon the first lease by an unwary or wilful attornment of the first lessee. And this concurrent lease for years has not escaped the censure of some learned men, though being adjudged at first in the Exchequer Chamber, by a majority of ten judges,(*c*) it has been ever since allowed for law; for my Lord Chief Justice Vaughan says, that this concurrent lease is neither within the letter nor meaning of the statute 1 Eliz. c. 19, the words of which are, *other than for twenty-one years, or three lives*, and in that case there is another lease *in esse* than for twenty-one years, or three lives; for there are two leases *in esse*, and so more than the statute warrants; and that the statute intended, when the first lease expired, the bishop who should then be, should have the advantage to make a new lease, which by allowing such concurrent lease may be prevented perpetually, except by way of remainder. And as for the intent of the statute, he said, though the party is estopped in pleading, yet the jury are not, but may find the truth of the case; and if the party dies to whom such concurrent lease is made, neither his executors nor administrators are estopped; for otherwise they would pay a rent for nothing, which would be in their own wrong, and against the right of the testator.(*d*)

Co. Lit. 44 b; Palm. 466, &c.; 5 Co. 2; Moore, 253; Leon. 59; Latch, 241; 2 Brownl. 162; Cro. Eliz. 141; And. 193; Ley, 78; Cro. Eliz. 111. Vide tit. *Rents.* (*b*) [See 5 G. 3, c. 27.] (*c*) ‖This decision in the case of Fox v. Collier, was, according to the report of Moore and Anderson, determined as here stated, by a majority of ten judges, Dyer, C. J., and Mead, J., being the dissenting judges. But in subsequent reports, in which it is spoken of, it is admitted by the courts to have been carried only by one or two voices of the judges. Evans v. Ascough, Latch, 233; Palm. 457.—In addition to what is here said by Lord C. J. Vaughan, we find Hutton, J., in the case of Bishop of Winchester v. Freeman, Ley, 78; treating the case of Fox v. Collier as ill-decided, as a resolution according to the very words, but without question, against the very intent of the makers. And Holborn, in his argument in Evans v. Ascough, Latch, 233, Palm. 457, observes, that the 18 Eliz. c. 11, was a parliamentary judgment against the decision. And in the same case, Doddridge, J., said, that a concurrent lease was very mischievous, and that the case of Fox v. Collier was carried only by one or two voices of the judges. But Whitlock, J., thought that not a reason to dispute it, and Jones, J., agreed with him; and Whitlock seemed to think that the decision ought to be the same, if the point were *res nova*. In the case of Threadneedle v. Lineham, 3 Keb. 372. Ellis, J., thought the opinion of Mr. Justice Hutton was not to be put in balance with the resolution in Fox v. Collier. Windham, J., however seemed to think, that the statute intended leases in interest only. In Touchst. 269, it is said, but no case is referred to, that in the case of a power to make leases for twenty-one years, if the party make more leases for twenty-one years than one at one time, they are all void but the first; because it is against the intention of the parties, though it be not against the words. If Doddridge were the author of this book, as is generally supposed, this passage shows that he continued of the opinion he expressed in Evans v. Ascough, *supra*. See further the judicious observations on this point in Mr. Sugden's Treatise of Powers, c. x. § 3, div. 3.‖ (*d*) 3 Keb. 378; Degg. 111.

It appears by the cases before mentioned, how and in what manner bishops may make concurrent leases, not being restrained therefrom by the 1 Eliz. c. 19. In the same manner likewise might deans and chapters, masters and fellows of any college, and other persons mentioned in the 13 Eliz. c. 10, not being restrained therefrom by that statute; but that being found a great mischief, was remedied and qualified by 18 Eliz. c. 11, which makes all leases by any of the said ecclesiastical, spiritual, or collegiate persons, or others of any of their ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years is in being, not to be

expired, surrendered, or ended, within three years after the making of any such new lease, to be void and of none effect; so that within these bounds they may likewise make concurrent leases for years.

Comp. Incumb. 806.

The dean and chapter of Norwich, 8 Eliz. made a lease to A for ninety-nine years, to begin after the end of a former lease then in being, which happened 35 Eliz.; afterwards, in 42 Eliz. the dean and chapter made a lease to the plaintiff for three lives, rendering the ancient rent quarterly, and covenanted to acquit and save harmless the plaintiff and the lands demised to him, during the lease, by reason of any lease made by them, or any of their predecessors; and livery was made upon it; but it did not appear whether it was the same dean that made the lease to A, nor that A had then entered: and now the plaintiff being evicted by the assignee of A, brought his action of covenant against the dean and chapter; and had judgment by reason of the express covenant; and also, because it did not appear that the dean, who was party to the plaintiff's lease, was dead. For it was agreed, that the lease to the plaintiff would be void against the succeeding dean by the 18 Eliz. c. 11, because there were then above three years of the first to come. But Coke held, that though there were four or five, or more years of a former lease to come, yet, if that former lease were surrendered within three years after the making of a second lease for years, such surrender would make good the second lease; but, if the first lease were for years, and the second for lives, then, though there were but two years to come of the first lease, yet the second would be void, which perhaps may be for the reasons mentioned in the concurrent leases by bishops: but, if so, then what my Lord Coke says in the same case must be a mistake, that if the plaintiff (whose lease was for three lives) had procured A within three years to have surrendered his lease to him, that this would have made good his own lease, which cannot be if what he said before be true; *ideo q.*

2 Brownl. 134, 158, 164; Moore, 875; Co. Lit. 45 b.

But for such houses, and so much land, as by 14 Eliz. c. 11, they may let for forty years, they cannot make leases in reversion or concurrent leases, because that statute expressly forbids leases in reversion thereof; and the 18 Eliz. c. 11, relates only to the 13 Eliz. c. 10, as appears by the following case.

Comp. Incumb. 807.

In trespass upon special verdict it was found, that the dean and chapter of Paul's made a lease for forty years of a house in London to begin presently, there being then ten years of a former lease to a stranger to come; and the court held this second lease merely void by 13 Eliz. c. 10, and not warranted by 14 Eliz. c. 11, which makes good leases of houses in market-towns for forty years, so they be not made in reversion; and this lease, though it be made to begin presently, yet, there being another lease *in esse*, is a lease in reversion, for so much as remains of the former lease. And so it was resolved in C. B. 14 Car. 2, in the case of Wynn and Wild, of a lease of the dean and chapter of Westminster; and though this was properly a concurrent lease, yet being a lease in reversion, it is forbidden within the express words of the 14 Eliz. c. 11, and so void against the successor.

Hunt v. Singleton, Cr. El. 564; Vent. 246; Carter, 9.

A vicar having made a lease for years of a house in a market-town, and of lands thereunto appertaining, *anno* 1672, when there were but two years of that lease to come, let it to another for twenty-one years from Michaelmas

then next, reserving the ancient rent during the term, payable at the four most usual feasts, or within ten days after, and this lease was confirmed by the archbishop, (patron of the vicarage,) and the dean and chapter of Canterbury. If the succeeding vicar was bound by this lease, was the question? and adjudged by all the court, that he was not. 1. It was adjudged, that the death of the vicar, by eighty days, did not make such non-residence as would avoid the lease within the statute of non-residence. 2. That though the rent were reserved at the usual feasts, or within ten days after; (and therefore, as it was urged, the term ending at Michaelmas, would be expired before the last day of payment; though for the other days it was agreed to be for the successor's advantage, because the predecessor might die within the ten days, and then the successor would have that whole quarter's rent;) yet the court resolved that the reservation was good in the whole, and that being reserved during the term, there should be no ten days given to the lessee for the last payment, according to Barwick and Foster's case, Cro. Jac. 227, 233. 3. It was adjudged that this was a lease in reversion, and so not warranted by 14 Eliz. c. 11, which, as to houses in market-towns, repeals the 13 Eliz. c. 10, but excepts leases in reversion; and this lease being to commence at Michaelmas next, was properly a lease in reversion, and differs from a grant of a reversion. And further, they all, but Hale, held, that if this lease, in this case, had been made to commence presently, yet it would have been void, there being another lease in being, so that for so many years as were to come of the former lease, it would be a lease in reversion; and they held, that the 18 Eliz. c. 11, which permits concurrent leases, so that there be not above three years of the former lease, &c., extends only to 13 Eliz. c. 10, and recites that, but not the 14 Eliz. c. 11, nor makes any alteration thereof. But Hale doubted of this, and inclined rather contrary, that if the lease had been made to commence presently, it had been good; because there were not then three years of the former lease to come, and he thought the 18 Eliz. c. 11, was a qualification as well of leases upon the 14 Eliz. c. 11, as upon 13 Eliz. c. 10. 1. Because the 14 Eliz. c. 11, is an appendix to 13 Eliz. c. 10, and only enlarges it as to houses in cities and market-towns; and therefore the 18 Eliz. c. 11, reciting the 13 Eliz. c. 10, does by consequence, recite also the 14 Eliz. c. 11. 2. Because there is such a connection between all the statutes concerning ecclesiastical persons, that they have been generally taken into the construction of one another; and that though 32 H. 8, c. 28, is not recited either in the 1 Eliz. c. 19, or 13 Eliz. c. 10, yet a lease is not warranted by those statutes, unless it hath the qualifications required by 32 H. 8, c. 28. 3. From the great rummage it would make in leases, if they should be void, when there was ever so little of a former lease unexpired.

Vent. 244; 2 Lev. 61; 3 Keb. 46, 107, 193, Bayly v. Murin.

The president and scholars of Magdalen College in Oxford made a lease of a house, &c., for twenty years, and ten years before the expiration thereof made a lease to another for twenty years, to begin after the expiration of the first lease; though this be, in strict propriety, a lease in reversion, yet it was said to be good, and to stand well within 14 Eliz. c. 11, because these contracts or leases do not intermix, but the one stands well with the other, and both together do not exceed the forty years comprised in the statute, which doth not hinder leases to be made from a day to come: but this opinion is (*a*) denied to be law, and seems also to be expressly against the foregoing

cases, where such lease to begin at a day to come, there being then another lease *in esse*, is condemned, though both did not exceed the term of forty years in the whole.

Thompson v. Trafford, Poph. 8. (*a*) 1 Vent. 246; 3 Keb. 107.

Rule 4. That such Leases are not to exceed three Lives, or twenty-one Years.

A fourth rule to be observed for making these leases good in law is, that they do not exceed three lives, or twenty-one years, from the making thereof; therefore, if a bishop makes a lease for four lives, and one of them dies in the life of the bishop, so that at his death there are but three lives in being, yet the lease is void against the successor, because being void by 1 Eliz. c. 19, at the time when it was made, no subsequent accident can make it good.

10 Co. 61 b, 62 a.

So, if a lease be made for three lives in this manner, viz. to one for life, remainder to a second for life, remainder to a third for life, this lease is void against the successor; because, otherwise the two first would be dispunishable of waste during their lives, by reason of the intermediate remainder; and so dilapidations, and other mischiefs, which the statutes intended to provide against, would be let in.

Cro. Car. 95, Owen and Ap Rees, Hetley, 22. [This point was made and argued at the bar, in the case referred to, but the court gave no opinion upon it.]

So, if an archdeacon makes a lease for three lives, according to the statutes, and the lessee makes a lease for 100 years, which is confirmed by the archdeacon, bishop, dean, and chapter, yet, such lease shall not bind the successor: or, if a bishop makes a lease for three lives, reserving the ancient rent, and then makes a lease for 100 years, if three men so long live, which is confirmed by the bishop and chapter; yet may the successors avoid this lease, and yet these are out of the words of the statutes; but if they are not to be construed to be within the meaning thereof, the statutes would signify nothing, and all ecclesiastical persons, by such evasions, might get out of the acts, and make what alienations they pleased.

Ley. 74, Bishop of Hereford's case; 5 Co. 15 a.

If a lease be made to A for the lives of B, C, and D, this is a good lease; for a lease to one for the lives of three others, and a lease to three for their lives, is all one, within the intent of these statutes; for three lives are the measure of the estate, which is all the statutes require. (*a*) But a lease for ninety-nine years, determinable on three lives, seems not good within the statutes of the 1 Eliz. c. 19, and 13 Eliz. c. 10, which make void all estates, gifts, grants, &c., (other than for three lives, or twenty-one years;) so that a lease for ninety-nine years, determinable on three lives, being neither of those, falls within the disability and voidance of the first part of those acts.

Cro. Ja. 76, Baugh v. Haynes. (*a*) ‖ The same construction would extend to a private power of leasing, but the lease must be made for lives *in esse*, T. Raym. 163, and the lives must be concurrent; the candles, as the phrase is, must all be burning at the same time, although the power is to demise, "for one, two, or three lives," which seems to import succession. Doe v. Halcombe, 7 T. R. 713; Sugd. Pow. 602.‖

But a lease by husband seised of lands in right of his wife, or jointly with his wife, of an estate of inheritance for sixty years, if they should so long live, was held sufficient to bind the wife surviving, within the 32 H. 8, c. 28, and no question made of it; the only dispute there being, Whether the wife ought to have joined in the indenture of lease? And that such leases for ninety-nine years, determinable on three lives, are good within that statute,

appears from the reasoning in (*a*) Whitlock's case; where it is adjudged, that if a man has power to make leases absolutely or generally, (as the several persons comprised in the statute of 32 H. 8, c. 28, have,) and a proviso or restraint comes after, (as in that act it does,) that such leases shall not exceed the number of twenty-one years, or three lives at the most; there, a lease for ninety-nine years, determinable on two or three lives, is good within the first part of the act, and not made void by the last part thereof, because it does not exceed the three lives thereby allowed, though it be not directly for three lives; but now a lease for ninety-nine years, determinable on three lives, upon the statutes of 1 Eliz. c. 19 & 13 Eliz. c. 10, is just the reverse of this: for the first part of these acts makes void all estates, gifts, grants, &c., by the persons therein-mentioned, and the last part saves only leases for twenty-one years, or three lives, &c., so that this lease being void by the first part of these acts, and not within the saving of the last part, being neither for twenty-one years, nor three lives, shall not bind the successor within these acts. *Sed quære de hoc.*

Cro. Car. 22, Smith v. Trinder. (*a*) 8 Co. 70, and vide 3 Keb. 595.

But though these statutes provide that these leases shall not exceed twenty-one years, or three lives, yet such leases for fewer years, or lives, are good: for the intent of the statute was only to abridge the power of making long and unreasonable leases, by reducing them to such a determinate number of years or lives, which they should not exceed, but might be made as much under as the parties pleased.

Leon. 306; 5 Co. 6 b; 8 Co. 70 b.

Rule 5. Of what Things Leases may be made to bind the Successor.

A fifth rule to be observed in the making of leases upon these statutes to bind the successor is, that they must be made of lands or tenements corporeal and manurable, whereto resort may be had for the rent reserved thereout by way of distress; for otherwise the successor may be without any remedy for the rent, and so dilapidations, poverty, and all the other mischiefs the statutes intended to provide against, be let in. Therefore, leases of fairs, markets, liberties, franchises, advowsons, commons, piscaries, offices, hundreds, tithes, or any other incorporeal inheritance, though with confirmation of the dean and chapter, or other persons required by law to confirm the same, will not bind the successor.

Co. Lit. 44 b, 47 a, 142 a, 144 a; 7 Co. 51; Leon. 333; Bro. tit. *Leases*, 17, 21, tit. *Grant*, 44, 59.

For the better understanding of this rule, it will be necessary to take notice of some distinctions, which plainly arise out of the books.

1. All the books agree that a lease for three lives of tithes, or other incorporeal inheritances before mentioned, will not bind the successor, though the ancient rent be reserved, and the lease or grant confirmed; the reason whereof is, that if such lease or grant should be good against the successor, he would then be without the tithes, &c., and have no remedy for the rent thereon reserved; for distrain he could not; because there would be no place wherein to take any distress, the things leased or granted being perfectly incorporeal and invisible; an assize he could not have, because either he had not seisin, or, if he had, yet there would be nothing to put in view of the recognitors; and an action of debt he could maintain during the lease, because, being for three lives, that is, an estate of freehold, which

will endure no action of debt so long as it continues; and so the successor would, in such case, have no manner of remedy for the rent reserved, which would be against the express provision and intent of the several acts.

5 Co. 3, Jewel's case; Cro. Ja. 111, 173; Moore, 778; Palm. 175. 2 Saund. 303; Hard. 326.

2. It is held likewise in some books, that a lease for twenty-one years of such incorporeal inheritances, though they have been usually demised, and the ancient rent be thereout reserved, that yet this is voidable by the successor within these statutes; because though the rent reserved be good by way of contract between the lessor and the lessee, and that debt may be maintained for recovery thereof; yet, they say, it is not such a rent as is incident to the reversion, nor shall pass with it to the successor; and therefore the successor having no remedy for the rent, shall not be bound by the lease.

5 Co. 3; Co. Lit. 44 b, 47 a.

But this point seems to have been shaken by contrary resolutions since Jewel's case, for some books expressly hold such lease for years to be good against the successor; because, they say, he has remedy for the rent by action of debt, and say it has been so adjudged, and take the diversity (*a*) between such lease for years and a lease for life: also, they say, that the rent issues out of the tithes in point of render, though not in point of remedy, because no distress can be taken for it; but that is supplied by the action of debt which lies for such rent, and shall devolve on the successor; and that such rent does not lie only in privity of contract, as a sum in gross, but is incident to the reversion, otherwise, the successor could not have it, being only privy to the estate, not to the personal contracts of his predecessor; and to this opinion the court inclined, but thought it a point of great consequence, and therefore, to avoid it, gave judgment on another point which was clear.

Talentine v. Denton, Cro. Ja. 112; Moore, 778; S. C. Ley, 76; Palm. 105; Hard. 326; Raym. 18; Lev. 108; 2 Saund. 304; Keb. 63; 2 Kep. 727; ‖ Dalston v. Reeve, 1 Ld. Raym. 71; Tippin v. Grover, Sir T. Raym. 18. In a late case in the Court of Common Pleas it was solemnly decided, that a covenant in a lease for years of tithes made by the lessee respecting them, ran with the tithes, and bound the assignee of the lessee, and, consequently, that an action lay against him for a breach of such covenant. Bally v. Wells, 3 Wils. 25; Wilmot, 341, S. C. (*a*) But now the statute of 8 Ann. c. 14, has enabled lay impropriators to make leases of their tithes for life and to bring debt for the rent; and the 5 Geo. 3, c. 17, gives the like power to ecclesiastical persons, as well as some other corporations, so that this diversity no longer exists.‖

3. All the books agree that a lease for three lives, or twenty-one years, of a manor, with the advowson appendant, or of lands or houses, and of tithes usually let therewith, reserving the ancient rent, &c., is good, and shall bind the successor within these statues; for though the rent does not issue out of the advowson, tithes, &c., in point of remedy, yet the rent is greater in respect thereof, and the successor has his remedy for the whole rent upon the lands, or other corporeal inheritances let therewith; (*sed quære*, if the tithes should be worth 200*l.* or 300*l.*, *per ann.*, and the lands not above 4 or 5*l.* &c.;) and Vaughan proves this from the express words of 13 Eliz. c. 10, which are, That all leases by any spiritual or ecclesiastical persons, having any lands, tenements, tithes, or hereditaments, (other than for twenty-one years, or three lives, &c.,) shall be void; so that the statute

plainly shows, that some way or other tithes may be leased for twenty-one years, or three lives; and if they cannot be leased singly, it must be with lands usually letten therewith.

Cro. Ja. 453; Moore, 201; 5 Co. 4; 2 Roll. Abr. 451; Vaugh. 203, 204; 2 Saund. 303; Leon. 333.

Therefore, where the dean and chapter of Norwich leased a parsonage and common of pasture, rendering rent, and 1 E. 6, surrendered their possessions to the king, and afterwards the king granted the parsonage, without speaking of the common of pasture; it was held, that the patentee of the parsonage should have all the rent, and no apportionment should be in respect of the common; because all the rent issued out of the parsonage, and nothing out of the common.

Lev. 333, Corbet and Cleer, cited.

A bishop, having an advowson appendant to a manor in right of his bishopric, grants the advowson for twenty-one years, and this was confirmed by the dean and chapter, yet held within the restraint of 1 Eliz. c. 19, and void against the successor; because, as was said, it was not such an hereditament whereout a rent could be reserved. But a better reason seems to be because no rent was at all reserved, and then, to be sure, neither the predecessor nor successor could have any benefit thereof by way of contract, or otherwise; nor did it appear to have been usually letten.

Cro. Eliz. 690, Armiger v. Bishop of Norwich and Holland.

The bishop of Oxford, having *primam vesturam sive tonsuram* of certain lands, after 1 Eliz. c. 19, lets to the plaintiff for three lives, rendering the ancient rent, and dies, and his successor, the now defendant, enters upon him, and takes the hay. It was urged, that this was not like the lease of a fair, because this concerned land, and was to be taken upon the land, and so the successor was not without remedy, because he might distrain the grass when it was cut. But *per curiam*, if the bishop had had *vesturam*, or *primam vesturam*, or *tonsuram*, from such a day to such a day, this had been such an hereditament as might have been leased; for there the bishop or his lessee might have mowed, and after fed it, during that time, and then the successor might have distrained the cattle; but here the bishop had only *primam vesturam*, viz. only the cutting of the grass once within such a time, and then his interest is at an end, and he cannot after feed it; so that it is no hereditament within the statute, whereof any lease can be made to bind the successor.

Palm. 174, Bishop of Oxford's case; Co. Lit. 47 a, 142 a, 186 b.

If a bishop, dean, and chapter, or any other person restrained by these statutes, grant the next avoidance of any church which they have in right of their bishopric, deanry, &c., though with confirmation of all persons interested therein, yet the successor shall avoid it; for this is such an hereditament as the statutes intended to restrain them from binding their successors by, and no rent can be reserved out of it; for such grant of the next avoidance can bring no manner of benefit to the successor.

5 Co. 15 a; 10 Co. 60 b; Cro. Eliz. 207, 440; And. 241; Mod. 204; 2 Mod. 56.

It hath been several times held, that bishops, or other ecclesiastical persons, are not restrained either by the 1 Eliz. c. 19, or 13 Eliz. c. 10, from making grants of copyhold lands in fee, in tail, or for lives, or for any number of years, according to the custom of the manor, and that no confirmation

is necessary to make such grants good, though they are made by a sole corporation, as by a bishop, prebendary, &c.

4 Co. 24; Ley, 80; Comp. Incumb. 253; and vide 3 Co. 7; Moore, pl. 276; Sav 66; Leon. 4; 4 Leon. 117; Heydon's case; Gilb. Ten. 179, 197.

The bishop of Winchester, 5 Eliz. with confirmation of the dean and chapter, granted an annuity or annual rent out of lands, parcel of the possessions of his bishopric, with clause of distress to it, *pro consilio impenso et impendendo pro termino vitæ suæ*, and died: the grantee brought debt against the executors of the bishop for arrears incurred in his lifetime; and the only question was, whether upon the 1 Eliz. c. 19, this grant was void against the successor, so that the grantee could not maintain a writ of annuity against him, but only an action of debt against the executors of the grantor? The case does not appear to have been adjudged, but it is cited in several books, that the annuity was determined by the death of the grantor; for though this was not parcel of the possessions of the bishopric, but only issuing out of them, yet if the successor should be charged with it, this would tend to his prejudice and impoverishment, which the statutes intended to prevent.

Dyer, 370 b; 10 Co. 61; 5 Co. 15; Hob. 97; Roll. Rep. 164, 171; Cro. Car. 49; 11 Co. 69.

So, where a writ of annuity was brought against the successor upon a grant made by his predecessor, and confirmation by the dean and chapter, yet it was adjudged that it would not lie, because it was not averred that it had been usually granted, though it was averred to be reasonable. And it appears by these cases, that if to avoid this act a writ of annuity were brought against a parson or vicar, who prayed in aid of the patron and ordinary, and upon default, judgment were given for plaintiff, this likewise is within the equity of the said act, and void against the successor. So, if a writ of annuity were brought against a bishop upon title of prescription, or otherwise, and judgment given against him by verdict or confession, yet this is restrained by 1 Eliz. c. 19, because the bishop is charged with the annuity in respect of the bishopric; and therefore the successor would be charged with the arrears incurred in the life of the predecessor, as it is held 48 E. 3, c. 26, and so it would tend to the diminution of the revenues, and impoverishing of the church.

10 Co. 61; Bishop of Chester's case, cited 30 Eliz. Rot. 346; Ley, 72; Bridg. 30, S. C. cited.

So, if a rent-charge be granted by any corporation restrained by these statutes, though this rent-charge be not parcel of their possessions, yet it is against the equity of the statutes, and void against the successor; for if bishops and other ecclesiastical persons were at liberty to grant what rent-charges they thought fit, and that these should be good and binding upon the successor, he might have his possessions so clogged and encumbered, as not to be able to keep up hospitality, or sustain the dignity of his function, and so the good design of these acts be wholly eluded.

5 Co. 15 a; Roll. Rep. 171.

In covenant, plaintiff declared of a lease by the predecessor of the defendant, in which was a covenant, that he and his successors would pay all taxes during the term, and assigns for breach, that such a tax was made by parliament for the royal aid, and that the plaintiff was forced to pay it, the defendant refusing to discharge it, *unde actio accrevit*, &c., and the only question was whether this were such a covenant as should bind the succes-

sor as incident to the lease by 32 H. 8, c. 28? for it is clear, if the bishop had made a covenant or warranty, this had not bound the successor at the common law, without the consent of the dean and chapter; and if it should now be taken that every covenant would bind the successor, the statute of 1 Eliz. c. 19, would be of no effect: but it was held, this covenant would not bind the successor; 1. Because it is not averred that such covenants had been used in former leases, as it ought to have been, to prove it an ancient covenant. 2. If this covenant had been in former leases, yet it could not bind to pay this new tax by parliament; but it must have been intended only of such as were then in use, viz. synodals, pensions, tenths granted by the clergy, procurations, &c.(*a*) It was held, however, that this covenant would not avoid the lease.

Vent. 223; 2 Lev. 68; 3 Keb. 69, Davenant v. Bishop of Salisbury. (*a*) ‖The court, according to Ventris's report, did not decide either of these points: the decision turned merely on an objection to the declaration, that it did not allege that the bishop was seised *jure episcopatûs;* it being necessary to show *quo jure* a sole corporation is seised, because he might be seised in his natural capacity.‖

Of grants of offices by bishops, &c., within these statutes, vide tit. *Offices.*

Rule 6. What shall be said a usual Letting to Farm upon the several Statutes, and by what Persons.

A sixth rule to be observed in the construction of leases upon these statutes arises upon the words of 32 H. 8, c. 28, that *that act shall not extend to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmers for the space of twenty years next before such lease thereof made.* The first construction that prevailed was, that this letting to farm within the twenty years ought to be by some person who had an estate of inheritance therein; and therefore, if the heir in tail were in ward of the king for twenty years, and during that term the king, or his grantee, made leases of lands of the ward which had not been usually letten or occupied in farm for twenty years before, this letting them to farm by the king, or his grantee, during the twenty years' wardship, is not such a letting to farm within the intent of the statute, as will enable the heir in tail, when he comes of age, to make a lease for twenty-one years, or three lives, of those lands, to bind his issue. So, if such lease were made by tenant by the curtesy, tenant in dower, or the like, of lands which before that time had not been most usually letten to farm for twenty years, their letting to farm of such lands for the greater part of twenty years, will not empower the issue in tail, when he comes into possession, to make a binding lease of such lands within the intent of the statute; for the intent of the statute was only to make good leases of such parts of the land as had been before usually letten by those who were owners of the inheritance, and best knew what was most proper to be let out, and what not, and therefore did not intend to establish leases made of any other possessions than those, which the owners of an estate of inheritance therein had, for the greater part of twenty years, thought fit to lease to farm; for if the leases of tenant in dower, tenant by the curtesy, guardian by knight's service, or such like, who, having only a particular estate therein, would be for making money of it all, and letting out the whole for rent; if leases made by such for eleven or twelve years or more according to the time they lived or had interest therein, should be a letting to farm within this statute; then might the issue in tail, when he came into possession, make a lease for twenty-one

years, or three lives, of the capital messuage or mansion-house, or, perhaps, of the whole estate, because those particular tenants had so done for eleven or twelve years, or more; and then if such tenant in tail should die the next day, his issue would not have a house to put his head in; which never was the intent of the statute.

Co. Lit. 44 a; Dyer, 271; Degg. 106.

So, where the temporalities of a bishopric come into the hands of the king, and he keeps them twenty years, or more, and during that time lets to farm for eleven years, or more, lands which had not been before accustomably letten, and then appoints a successor, and restores him the temporalities, he cannot by any lease bind his successor, for those lands, which had no other warrant for his leasing thereof, than only that the king, whilst the temporalities were in his hands, had let them to farm for eleven years or more; and he might have let the bishop's palace, or the demesnes about it; and then if the successor might likewise make a binding lease thereof for twenty-one years, or three lives, and should die, or be removed soon, the mischief intended to be remedied by the statute, in giving the farmers a secure and lasting possession during their leases, would introduce a much greater upon the successor, by shutting him out of all the houses and lands belonging to the bishopric for twenty-one years, or three lives; and so, instead of maintaining hospitality, as the books speak, would occasion nothing but quarrels and contentions. So, for the same reason, a letting to farm by a disseisor or any other who has not a rightful estate of inheritance, though it be for the greater part of twenty years, is not a letting to farm by such a person as will enable the tenant in tail, bishop, or other person intended to be provided for by this statute, to make any binding lease of lands which were not accustomably letten to farm for the greater part of twenty years, by those who had a rightful estate of inheritance therein.

Palm. 175, 176, Bishop of Oxford's case.

But as the mischief would be great on the one hand, to construe the statute in such a manner as would empower the persons before mentioned to determine of what parts and possessions leases might be made good and binding against the successors, issues in tail, and other persons intended to be bound by the act; so, on the other hand, a construction not less hurtful to them seems to have obtained upon the same words of the statute; which provide, *That it shall not extend to any lease of any manors, lands, tenements, or hereditaments which have not most commonly been letten to farm, or occupied by the farmers for the space of twenty years next before such lease thereof made;* upon which words it is held, that the lands to be leased within that statute must be such, and such only, as have been letten to farm, or occupied for eleven years, or more, at one or several times within the twenty years next before the lease for twenty-one, or three lives, to be made; so that if lands have been formerly let to farm never so long, or often, yet if the tenant in tail, or bishop, should keep them in his own hands fifteen or twenty years, these lands cannot be leased for twenty-one years, or three lives, to bind the issue or successor, till they have undergone a probation of twenty years longer, and within that time have been letten to farm, or occupied by farmers for eleven years, or more. So, if the temporalities come to the hands of the king, and he should keep the lands usually letten in his own hands forty or fifty years, more or less, and then restore the temporalities to the successor, he must then begin to let them to farm, till they have run out in farmers'

hands eleven years at least, otherwise he can make no lease for twenty-one years, or three lives, within this statute. So, if a disseisor after a lease for twenty-one years, or three lives, expired, enter upon the bishop, or tenant in tail, and hold the lands twenty years, or more, and then the bishop, or tenant in tail, or their issue or successor, enter, though these lands were demisable, and actually demised, within the statute, but just before the disseisor entered, yet now they cannot be again leased for twenty-one years, or three lives, till they have been in farmers' hands for eleven years at least; and so it is in the power of the king, the disseisor, nay of the bishop, or tenant in tail himself, to evade and elude the intent of the act, by keeping the land ten or twelve years in their hands; and though they die, or are removed presently, yet the successor or issue can have no benefit of the statute till after eleven years at least.

Co. Lit. 44 b; Cro. Eliz. 708, Mallet and Mallet, Sir John Mervyn's case.

These reasonings and instances were pressed and urged in a (*a*) case by Twisden and Chief Justice Keeling, against Windham and Moreton, and they thought them so considerable, that it put them upon finding out a more easy and natural construction.

(*a*) Where the case was, that the archbishop of York in 1604, made a lease for three lives, rendering the ancient rent; in 1630, this lease was surrendered, and the lands remained unlet till 1662, when the archbishop made a lease thereof to the plaintiff's lessor, rendering the same rent as was reserved in 1604, and died, and the then archbishop entered, and let to the defendant; and whether these lands, not having been let since 1630, could be leased again, was the question? and Twisden and Keeling, for the reasons herein mentioned, held they might. Lev. 212; Sid. 316, 416; Raym. 165; 2 Keb. 213, Pemble v. Stern.

For they held, that the clause consisted of two parts in the disjunctive, and if either of them were observed, it was sufficient to warrant the leasing for three lives, or twenty-one years, within the intent of the statute: the words are, that, *that act shall not extend to any lease of any manors, lands*, &c., *which have not most commonly been letten to farm.* This is the first part of the disjunctive, and is general: the other part is, *or occupied by the farmers thereof by the space of twenty years*, &c., and they thought the most natural and genuine meaning of the words to be, that the lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed part of the demesnes of the bishopric, or such as have been occupied by the farmers thereof by the space of twenty years, &c., that is, if the bishop has let out part of his demesnes to farm, and the occupation of the farmer has been approved for twenty years together, as not any ways inconvenient to the bishop, the statute will presume that they are lands fit to be let. And as to the authorities against this opinion, Twisden said, in Mallet's case, that point came in unnecessarily; and Keeling, that it came in on a foolish argument, and therefore was of no great weight; and so in Sir John Mervin's case, the point never came in question, but only *dictum fuit pro lege.* And as to my Lord Coke, (though he were a grave and learned man,) yet he was not infallible, nor did he desire to be accounted so, and this opinion of his was not judicial, so that if it had come to an argument he might possibly have thought otherwise; for Keeling said he was himself of that opinion, till he came to consider the case, and weigh the inconveniencies of that construction. And it was said that Queen Elizabeth kept the temporalities of the bishop of Ely above twenty years in her hands, and yet no question of his leases after. And they said likewise, that

the Lord Coke's inference was false, and not warranted by the statute, viz., that if it had been leased for eleven years it would be sufficient; for the first part of the statute, as to leasing, seems to refer to a more ancient time. Also it was held, that if the other construction prevailed, these lands, or any other which continued unlet for eleven years, could never after be let again for twenty-one years, or three lives, because they were not most accustomably letten, &c., by the space of twenty years, which makes it the more reasonable to reject such construction. *Sed quære*, if by letting them again to farm for eleven years, or more, the power given by the statute to lease for twenty-one years, or three lives, be not set up again? but *quære*, since, as it appears before, the letting to farm by the king, or a disseisor, &c., is not sufficient within this statute, whether likewise their keeping it in their hands for eleven years, or more, be of any prejudice to the bishop, or his successors, or to the tenant in tail, or his issue? for if the statute only intended letting to farm by the bishop or tenant in tail himself, then all the objections before mentioned seem to lose their force, unless where the bishop, or tenant in tail, keeps the lands undemised in his own hands for eleven years or more.

A lease made by the predecessor of the plaintiff for three lives, rendering rent, and confirmed by the dean and chapter; the defendant claiming under it avers that it was the usual and ancient rent, and the land usually demised; the plaintiff replies, that it was usually before that lease retained in the hands of his predecessors for hospitality, and traverses *absque hoc*, *quod fuit magis usualiter dimissa*, &c.: it was held a good traverse; for since 32 H. 8, c. 28, appoints that the ancient rent shall be reserved, it is thereby implied that the land should have been usually demised, otherwise the ancient rent cannot be reserved.

Cro. Eliz. 874, Bishop of Hereford and Scorey.

Another thing required by the statute is, that these leases be made of lands usually letten to farm, &c., upon which words it hath been adjudged, that a demise by copy of court-roll is sufficient; for that is in judgment of law but an estate at will; and without question, lands demised at will by those who have the inheritance, rendering rent, are lands accustomably letten to farm within the said act; and so it was ruled 7 Eliz. in Sir John Mervin's case, where tenant in tail let a copyhold by indenture, rendering the same rent as before, and held a good lease within 32 H. 8, c. 28, and Williams said, he had known it thrice so adjudged in his time, in the case of tenant in tail.

Co. Lit. 44 b; 6 Co. 37 b; Cro. Ja. 76; 2 Jon. 29; Moore, 759; Raym. 167; Sav. 66; Leon. 4; 4 Leon. 117.

But, where tenant in tail had power, by a particular act of parliament, to make leases for life, lives, years, or at will, after the custom of the manor, yielding the true and ancient rent, &c., and he made a lease both of freehold and copyhold by a deed at common law, reserving such a rent; this was held not to be warranted by the statute as to the copyhold, because the statute speaks of leases at will by the custom of the manor; which imports, that the statute did not intend that copyholds should be demised otherwise than they were before the statute, and that was by copy of court-roll, not by a lease for years, and the rent to be reserved thereon was customary rent, not rent upon a lease for years at common law.

Moore, 199; 5 Co. 5 b, Lord Mountjoy's case.

(E) Of Leases for Lives or Years by Ecclesiastical Persons.

Rule 7. What Rent is to be reserved: and herein,

1. *That there must be a Rent reserved.*

As to this the statute is express that a rent must be reserved; and therefore where the college of All Souls in Oxford made a lease without reservation of any rent, though it was but to try a title, yet it was held void, the statute being express and positive; and therefore no construction or pretence can be urged to avoid the statute. But in that case it did not appear that no rent was reserved, but only the plaintiff had not shown that there was any reserved, and yet there might be, in the lease; and if not, the defendant ought to show it; and so the exception disallowed.

Moore, 593; Leon. 306; Carter v. Claypole, Sav. 128.

2. *That this Rent must continue due, and be payable to the Lessors and their Successors.*

This also is so strictly required by the statute, that it hath been held, that if a bishop, tenant in tail, &c., make a lease of land, the ancient rent whereof was 10*l.* and reserve but 5*l.* *per annum* during his life, and 10*l.* *per annum* after his death, to the issue or successor, yet this lease shall not bind, because the rent originally reserved was not pursuant to the statutes; though there can be no pretence of prejudice to the issue or successor, more than if the bishop, or tenant in tail, &c., should release the rent, or any part of it, during their own lives, which surely they may do: *ideo quære?*

5 Co. 6 a.

3. *That such Rent must be the same, or more in Quantity than hath been reserved within twenty Years next before such Lease made: And herein,*

1. *What shall be said to be the ancient Rent, where Variety of Rents have been reserved, or something formerly reserved now omitted or varied.*

As to this, where variety of rents have been reserved, as formerly 10*l.*, then 20*l.*, then 30*l.*, and lastly 40*l.* *per ann.* or *è contra* formerly 40*l.*, then 30*l.*, then 20*l.*, and lastly 10*l.* *per ann.*; the 10*l.* in the one case, and the 40*l.* *per ann.* in the other case, are the rents to be reserved on any new lease to be made: but with this diversity between leases made by virtue of the several statutes before mentioned, and leases by virtue of powers in private conveyances and settlements; for upon leases made by virtue of the several statutes before mentioned, this was the measure immediately after these acts passed, and must continue so still; because the same acts being to warrant every successive lease as well as the first, there can be no variation of the rent in any other lease to be made from the rent, which, upon construction of those statutes, was in the first lease made by virtue thereof, settled to be the ancient and accustomed rent; and consequently, the variety of rents in such leases must have been only before the statutes. But upon leases made by virtue of powers in private conveyances and settlements at this day, reserving the old and accustomed yearly rent, or the most ancient and accustomable yearly rent, there, the rent reserved on any lease then in being, or upon the lease made last before such settlement or conveyance, seems to be the measure of the reservation upon any lease after to be made by virtue thereof; for the intent of such power, as well in such settlements as upon the several acts before mentioned, was only that they, who were to make leases by virtue thereof, should not put the estate in any worse condition than it was at the time of such settlement, or of those acts made, but keep it in the same plight and condition as it then respectively was; and

the rent reserved last before the making of such settlement, or of those acts, may well be called old or ancient in respect of the new rent to be reserved on such lease, to be made after such settlement, or after those acts. But the Lord Cowper, in the case of Lord (*a*) Mohun and Orby, seemed to make a doubt of this construction of the words *ancient and accustomable rent*, and thought the last rent no certain rule to go by; for suppose it were leased once at a greater, and twice at a less rent, he thought the ancient rule must be that reserved on the first lease; for the two last may be made by a tenant in fee, who was not bound to reserve the ancient rent, but might let it for nothing, if he pleased. But upon the 32 H. 8, c. 28, or the same words in private powers, viz., so much yearly rent, or more, as hath been most accustomably yielded or paid within twenty years next before such lease thereof made, if a greater rent had been reserved before the twenty years, yet the rent reserved within the twenty years, though it were less, must be the measure of the reservation upon leases to be made by virtue of that statute, or of private powers worded in the same manner. But, if within the twenty years it had been let once at a greater and twice at a less rent, then the question will remain, which of the reservations will be the measure of the rent to be reserved on any two new leases to be made? and how far the opinion of my Lord Chancellor Cowper will outweigh the opinions of my Lord Chief Justice Hale and Holt is considerable, though their opinions seem to fix a standing rule to go by, whereas his leaves it at great uncertainty, from which no rule can be formed; for it may have been let twice formerly at a less rent, and once, on the last lease, at a greater; and if the first reservation in this case, being greater, shall be the rule, why should not the two first, in this case, though they are less? for his reason seems to turn upon the priority and antiquity of the rent, so that the first rent, according to his opinion, and the last rent, according to their two opinions, are to be the measure of the reservation.

Hard. 325, 326; Morrice v. Antrobus, *per* Hale. (*a*) 2 Vern. 531, 542; Pr. Ch. 257, S. C.; Gilb. Eq. Rep. 45, S. C.

In some cases, leases, by virtue of these statutes, will be good, though there be an omission of things formerly reserved, or a variation in the rent reserved in point of time: therefore, where the dean and chapter of Worcester were seised of the manor of H in fee, in right of their church, of which manor one G was copyholder for life, under the ancient rent of 8*s.* and 8*d.* payable at the four quarter-days of the year, and heriotable at the death of the tenant, and the copyholds of that manor were grantable by custom for three lives; the dean and chapter, 24 Eliz., by indenture under their common seal, demised the said lands to G and his assigns for the lives of A, B, and C, and the survivor of them, rendering 8*s.* and 8*d.* half-yearly, and without reservation of any heriot; and after this lease made the dean died, and his successor and the chapter entered to avoid this lease upon 13 Eliz. c. 10, (among other reasons;) 1. Because the ancient rent was not reserved by reason of the loss of the heriot. 2. Because the rent was not payable, as is used to be; for before, it was payable quarterly, and now it is reserved payable half-yearly, which is not so beneficial to the successor. But it was adjudged, that, notwithstanding these objections, the lease was good, and should bind the successor; for the 13 Eliz. c. 10, does not avoid any lease, if the accustomed rent, or more, be reserved; and here, the accustomed rent is reserved, and the omission, or loss of the heriot, is not material, because that was not a thing annual or depending upon the rent, but

perfectly casual and accidental. 2. That though the rent was formerly reserved quarterly, and now half-yearly, yet the lease is good, and so would have been if it had been reserved only yearly; for the words of the act are, *whereupon the accustomed yearly rent, or more, shall be reserved;* so that if the rent be reserved yearly, the words of this act are satisfied, and this word *yearly*, not being in Mountjoy's case, makes the difference. And yet this rent had not all the beneficial qualities the other rent had; for whilst it continued copyhold, the lord might have entered for a forfeiture upon the denial or non-payment of the rent, which now, upon this lease thereof, at common law, he cannot do.

6 Co. 37; Cro. Jac. 76; Co. Lit. 44 b; Moore, 759, Dean and Chapter of Worcester's case; Com. Rep. 312, Coventry v. Coventry. ‖ Campbell v. Leach, Ambl. 740. See Earl of Cardigan v. Montague, Sugd. Pow. App. ix. It was said by Powell, J., and assented to by Holt, C. J., that if a man has a power to make leases reserving the ancient yearly rent annually, if it were reserved on a day before the year was up, as, if the year ended at Christmas, and it were reserved at Michaelmas, it would be well pursuant to the power. 2 Ld. Raym. 1198. But *qu.* as this would have a tendency to benefit the tenant for life at the expense of the remainder-man. Sugd. Pow. 615; ‖ 5 Co. 4 b, 5 b.

If the rent was anciently payable in gold, and it is now reserved payable in silver, this lease should not bind the successor; for the variation may be prejudicial to the heir or successor, by the fall of silver; and though the same may be said were it reserved in gold, as it used to be, yet by continuing the species of reservation formerly made, the lessor hath used all the precaution the statute required, and the accidental fall after can be noways imputed to him.

5 Co. 4 b, 5 b.

But, if a quarter of corn was anciently reserved, and now a lease is made, reserving eight bushels of corn, this is good; for the reservation is the same both in quality, value, and nature, and differs only in words.

5 Co. 4 b.

A precentor or chanter of St. Paul's being seised of the parsonage of S, in *jure cantariæ*, leased a portion of tithes for two years, rendering 8*l. per ann.* and reserving pasturage for a colt in the land of the lessee; and the lease being expired, his successor made a lease for twenty-one years of the said portion of tithes, rendering 8*l. per ann.* but omitted the running of the colt; yet the lease was held good, because it was a thing reserved out of the lands of the first lessee only, which the successor could not reserve, such first lessee not being his tenant of the tithes: otherwise perhaps, if the reservation had been general.

Palm. 106, Ensden and Dennys.

2. *In what Manner such Reservation is to be made.*

All that seems necessary here to be observed is, that there must be a particular mention or specification of the sum intended to be reserved, as well upon leases to be made by virtue of these statutes, as upon leases by virtue of powers in private conveyances and settlements; for otherwise the heir, or successor, would be put to infinite trouble, vexation, and expense, if the reservation might be allowed to be made in the same or as general terms, as the power itself was; and the necessity of averring and proving what was the ancient and accustomable rent were to lie upon them.

Therefore, where a bishop was seised, in right of his bishopric, of three manors which had been usually let together at the rent of 32*l. per ann.* and

made a lease of the said three manors, except such and such parts thereof, rendering the ancient, usual, accustomed yearly rent, and the rents and services at the days and times usually accustomed, without specifying any rent or sum in particular; it was adjudged, that this lease should not bind the successor, because the usual and accustomed rent was 32*l. per ann.* where all the said three manors had been let without any exception; whereas now part being excepted, that which was the usual and accustomed rent for the whole cannot be said the usual and accustomed rent for part; and then the reference being general to the ancient and accustomable rent, nothing at all is reserved, and, by consequence, the successor is not bound by such lease. This appears to be the reason in the book for the avoidance of that lease, and being sufficient for the purpose, there needed no other: but it will appear by the following case, that if the whole three manors had been let without any exception, yet the reservation in such general terms would have been sufficient to have avoided the lease.

Cro. Car. 95; Owen v. Ap Rees, 3 Keb. 380.

Fitton Gerard was tenant for life, with power to make leases for twenty-one years, or three lives, so as upon every lease of such lands as had been usually letten, and fines taken for them, the old accustomed rent, or more, be yearly reserved; and so as upon every lease of other lands not usually letten, or fines taken for them, there be reserved the best improved rent that can be gotten for the same, and the lessees to execute counterparts thereof. Fitton by indenture, 21 Decemb., 1702, demises to the defendants all such lands as had been usually letten, and fines taken for them, for ninety-nine years, if three persons should so long live, with a reservation in these words, *yielding* and *paying* therefore *the respective old and accustomed yearly rents;* and if this reservation was pursuant to the power, was the question? And my Lord Chancellor Cowper, being assisted with the two Chief Justices Holt and Trevor, decreed, that this lease was not good to bind the remainder-man; but my Lord Chief Justice Holt differed in opinion, and held this lease good. 1. Because the reservation being in the very words of the power, if the power was good, the reservation must be so too; for the same words must have the same meaning in both; and if a sum certain had been reserved, yet it must have been averred to have been the ancient and accustomable rent, or more; and therefore this reservation, in the words of the power, may be helped by such an averment, and, consequently, is good. 2. That if any of the lands comprised in this lease had not been anciently let, though the reservation in such manner as to them would be void, yet the lease would remain good as to the others.(*a*) 3. Though all the lands were comprised in this one deed of lease, yet the remainder-man, who is to have all the deeds in his custody, might easily distinguish them, as well as if they had been let by several leases, as they were formerly. But my Lord Chancellor and Trevor held this lease void against the remainder-man, and not pursuant to the power. 1. Because it was never intended that the words of the power should be turned *verbatim* into a reservation in leases; and to say, that if the words in the power are good, they cannot be bad in the reservation, is a strange position. Suppose in the power to make leases it were provided, that in every such lease there should be inserted such covenants as are usual in leases in that county, and a lease were made in the very words of the power, would this be good? Certainly not; nor could it be aided by any special verdict, finding the covenants usual in that county. 2. The question in this case is not between the lessor and the lessee, (between whom perhaps the lease may be

good, and the rent recoverable;) but the question is, as to the remainder-man, whose remainder and inheritance is to be charged by a power which is to be taken strictly, and is not pursued; for the intent thereof was, that a certain rent might be reserved upon every lease to be made, so that he in remainder may know how to come at it, and form his action for the recovery thereof, which, as this reservation is, he cannot do, but will be involved in perpetual controversy and uncertainty; for he must not only aver and avow that the sum he distrains for is the ancient rent, but must also prove it; for if the tenant can show another more ancient rent, then he may nonsuit the remainder-man, and so *toties quoties* he distrains or avows for any rent, the tenant by showing that another rent has been reserved, may baffle him and keep the land in spite of his teeth, without any rent at all, till he is so lucky as to hit upon the true sum reserved upon every several lease, which will be very difficult for him in remainder to do, and is no way agreeable to the power. But, if a certain sum had been reserved, and the counterpart shown under the tenant's hand, he must either show a more ancient rent, or it will be presumed for the plaintiff; and if he should show one more ancient, the consequence of that will be the avoiding of his own lease, which to imagine he should attempt is absurd; and without defeating the lease he can never avoid payment of the rent when it is reserved in certainty; but as it is reserved here, it is wholly uncertain. And my Lord Chancellor said, it was the first attempt that ever was made to delegate a power generally that was to have been executed particularly, and was a new invention tending to introduce perjury, forgery, and frauds, and therefore was not to be countenanced.

Trin. 1706, in Chanc. Lord Mohun and Orby, Eq. Abr. 343, pl. 5; 2 Vern. 531, 542; Gilb. Eq. Rep. 45: Pr. Ch. 257; 3 Chan. Rep. 102; 10 Mod. 473; 3 Br. P. C. 248. (*a*) So Campbell v. Leach, Ambl. 740; [1 Burr. 121.]

So, in the same case, where tenant for life had made a lease of the lands not usually letten, reserving therefore the best and most improved rents for the same, according to the words of the power; this was held so utterly uncertain, that nothing was offered to support it.

But a case was therein cited, where Mr. Venables of Cheshire had power, by a settlement, to make leases of lands anciently demised, reserving at least 12*d.* for every Cheshire acre; and he made a lease of all the lands anciently demised, *reserving all the rent intended to be reserved;* and though these words were very general and uncertain in themselves, the reservation was held good, because it might easily be ascertained by the reference of 12*d.* at least, for every Cheshire acre, because it is known what a Cheshire acre is; and that may by admeasurement be at all times ascertained, and depends not upon uncertain evidence.

Lewson v. Piggot, 3 Ch. Rep. 61, 76.

[So, where one by virtue of a power makes a lease, and reserves as rent two parts in three of the yearly value of the premises according to the best improved value, without mentioning any sum certain; it was holden that the lease was nevertheless good; and that unless proof were made of a greater value than had been constantly paid and accepted by the remainder-man, such sum must be taken as two parts in three of the full value of the premises at the time of making the lease, which, or the greater value, if so proved, was to be continued to be paid, whether the premises rose or fell in value.

Audley v. Audley, 2 Ch. Rep. 82.] ‖ In this case Mr. Sudgen observes, the power does not appear to have required the reservation of any rent. Tr. of Powers, 612.‖

|| So, where a tenant for life, with a power of leasing, contracted to grant a lease at the yearly rent of 7*l.* for every acre the lands upon a proper survey to be had should appear to contain, and so in proportion for every less quantity than an acre, and the uncertainty of the rent was objected against the performance of the agreement; Lord Redesdale said, that he did not think it uncertain, for it was capable of being reduced to a certainty, and it was the common form of reserving the rent in the country where the land was situated. Every executory contract must contain this species of uncertainty, but if it contains all that leads to future certainty, he took it to be sufficient.

Shannon v. Bradstreet, 1 Sch. & Lefr. 52.||

A precentor of St. Paul's made a lease of lands, the ancient rent whereof was 40*l.* and a couple of capons, and he now reserves only the 40*l.* and takes a covenant from the lessee to pay yearly, over and above the 40*l.* a couple of capons, or 6*s.* and 8*d.*, yet this was held such a covenant as amounted to a reservation, and therefore the lease good against the successor. But as the lease in this case was made to baron and feme, and the baron only covenanted in that manner, which would not bind his wife if she survived; so for that reason it was holden the successors would not be bound.

Hard. 325, Morrice v. Antrobus.

See further *infra* (G), div. 11.

3. *Where the Addition of more Land, with or without the Addition of more Rent, shall avoid such Leases.*

Tenant in tail, or any spiritual person, in right of the church, seised of a manor whereof the copyholds and services have not usually been let, but only the freehold demesnes, makes a lease of the whole manor, reserving such a sum only as amounted to the ancient rent: this lease shall not bind the issue or successor. But where the reservation was several, viz. reserving the ancient rent in certainty for the lands anciently let, and another distinct rent for the copyhold and services, not usually before letten; the lease was holden to be good as to the lands anciently let, because for them the ancient rent was reserved.

Ley, 74, 77; Cro. Eliz. 340, 341, Tanfield v. Rogers.

A prebend usually let, with the exception of all crab-trees, &c. at 17*l.* *per annum*, was now let for three lives at that rent, without the exception, and adjudged that the lease was void to bind the successor, because there was more let than had been anciently; for by the exception of the trees, the fruits and boughs, and soil itself, were excepted, which now by this lease pass to the lessee; and so more being let than formerly, it is not warranted by 32 H. 8, c. 28, and then the rent thereout reserved cannot be said to be the ancient rent, and by consequence, is made void against the successor by 33 Eliz. c. 10.

Cro. Ja. 458; 3 Bulst. 290, Smith v. Bole.

Tenant in tail by special act of parliament having authority to make leases, &c., *reddendo verum et antiquum redditum*, makes a lease of lands anciently demised, and of an acre of waste not before demised, reserving the ancient rent and so much more as the acre of waste was worth; and yet held, that this addition of acre of waste spoiled the whole lease, because the rent being entire in the reservation issued out of the whole, and out of every part thereof, and the acre of waste being never demised before, it could not be said *verus et antiquus redditus*, which issued out of that which never before yielded any rent at all.

5 Co. 5; Moore, 197, Lord Mountjoy's case; Co. Lit. 44 b.

(E) Of Leases for Lives or Years by Ecclesiastical Persons.

If two farms have usually been let severally, the one for 20*l.* and the other for 10*l.*, and a bishop, tenant in tail, &c., makes a lease of both together, rendering 30*l.* *per annum*, and dies, &c., this lease shall not bind the issue or successor, for the ancient rent issuing formerly out of the two farms severally, according to the aforesaid proportion, now issues wholly out of each, and out of every part of each; and where before the rents were several, now they are entire; and it was said to be but wantonness, to save parchment and paper to join them together in one lease, when they were usually, and ought to have been let severally; and there was no necessity or colour of convenience to join them in one lease; and if he might join two, he might as well join twenty, which would be very prejudicial to the successor, since it is a kind of seignory and prerogative to have several tenants: therefore, if 40*l.* *per annum* had in that case been reserved for two farms, which is 10*l.* *per annum* more than the ancient rent of both; yet this shall not bind, not because more is reserved than the ancient rent, (for that the statute allows,) but because by their being joined, if the tenant should prove insolvent, the loss would be greater upon the issue or successor.

5 Co. 4, 5; Co. 139; Cro. Car. 23; 3 Keb. 380.

Devisee for life, with power to make leases, whereupon the old and accustomed yearly rent shall be reserved, entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the ancient rent, &c.: it was insisted, that this could not be said to be the ancient rent, because part of it is issuing out of the new house: but the justices would not suffer it to be argued, but held the rent to be well enough reserved.

Leon. 147, 148, Read v. Nash.

‖ Where two pieces of land, one of which has been anciently let, and the other has never been in lease, are included in one demise, and one entire rent is reserved for the whole; it seems to be settled, that the lease is void for the whole; but, if there is a several reservation of the ancient rent for the lands which have been anciently let, the demise under the power would be good for them, and void only for the rest.

Doe v. Rendle, 3 M. & S. 108.

But, it has been holden, that a lease comprising lands of which the lessor was seised in fee, and other lands of which he was tenant for life only, with a power to lease at one entire rent, is good for the lands in fee-simple, because, according to Co. Lit. 148 b, the rent may be apportioned.

Doe v. Meylor, 2 M. & S. 276. The case of Rees v. Philips, Wightw. Exch. Rep. 69, *contra*, overruled by this case. See also Coxe v. Day, 13 East. 126, the third point.‖

4. *Where a Reservation of the whole Rent, or only* pro rata *on a Lease of Part, shall be good.*

On a special verdict the case was in substance no more than this: A bishop seised of two manors in right of his bishopric, which had usually been let for 67*l.* 1*s.* 5*d.* *per annum*, now makes a lease for twenty-one years of one of those manors only, reserving the whole rent: and if this was a good lease within the statute 1 Eliz. c. 10, was the question? The objections against it were, 1. That the remedy for the rent was not so ample and beneficial as it was before; for before, the rent issued out of both, now, out of one only, and the statute is to be taken strictly, to prevent dilapidations and decay of spiritual livings. 2. That this was not the old

accustomed rent, because it did not issue of the same lands, but out of less; and if that be allowed, you may leave but a moiety or quarter part, or but one or three acres to answer 100*l.* *per annum.* 3. It was objected, that now the bishop could not lease the other manor at all: for if for the ancient rent, perhaps it is not worth so much; if for less, it is not the ancient rent: or supposing he could lease the other manor for less rent, yet the ancient rent, which the statute chiefly designed to provide for, will not be at all the better secured; for now being reserved out of one manor only, that will be the only fund to answer it for the future; and if the value of lands should fall, as probably they may, there will be no sufficient security or distress for the old rent, though perhaps the new rent, being less, will be abundantly secured. And of this opinion were Vaughan and Ellis; but Atkins and Windham held it a good lease: and after the death of Vaughan, North being of the same opinion, it was adjudged a good lease, and this judgment affirmed in B. R. upon a writ of error; for the ancient rent being reserved, the statute is satisfied, and what is not in lease is in the bishop's own hands. And though the distress for the ancient rent be not so large, yet the bishop cannot complain, having the residue of the lands in his own hands, or out upon another lease. And by Windham, if a bishop should enlarge a garden or orchard, it would be unreasonable so to tie him up, as to force him to hold the residue of the tenancy in his own hands, and never suffer him to demise it again, because he cannot reserve the ancient rent, as that issued out of every part of the old land: but he agreed, that if the bishop in this case had made a lease of both manors, reserving the ancient rent out of one of them only, this would not have been good to bind the successor, because he departed with the whole land chargeable with the ancient rent, and yet confined the successor's remedy for such rent to part of the lands only: but in this case he having the residue of the lands in his own hands, it is clearly out of the mischief of the statute.

Mod. 203; 2 Mod. 57; 3 Keb. 192, 372, 583, 595; Pollexf. 176; 1 Freem. 92, 119, 165, 179, Threadneedle v. Lynam.

If lands usually let at such a rent descend to two coparceners in tail, each may let her own part, reserving rent *pro ratâ:* for it would be unreasonable that the frowardness or perverseness of one sister, in not complying to join in a lease with the other sister, should hinder them both from making leases at all: and the descent, which caused the coparcenary, was an act of law, which they could not prevent or hinder, and the acts of law do no injury to any one. So, if a manor was usually let at 10*s.* *per annum* rent, and a tenancy escheats, and then a lease is made of the whole manor, reserving 10*s.* *per annum*, this is good, though the rent issues also out of the tenancy, and that never was in lease before; for the escheat was the act of law, and by that the seignory being extinct ought not to turn the prejudice of the lord. But, if the lord had purchased the tenancy, he could never have leased it within 32 H. 8, c. 28, or the other statutes, because the purchase was his own act; and therefore the tenancy having never been leased before, no ancient rent can be reserved thereout, no more than a manor which had never been leased can now be leased by virtue of any of those statutes.

5 Co. 5, 6.

The books are not agreed, whether a bishop, tenant in tail, or any spiritual person, &c., of lands usually let for a certain rent, may make a lease of part thereof, reserving rent *pro ratâ;* but the better opinion seems to allow

of such leasing, (*a*) because this in effect is the ancient rent; and otherwise, perhaps, they could not lease at all, if they had not a power of dividing the great farms; and Mountjoy's case, which is contrary, they say, was adjudged upon a private act of parliament for enabling a particular tenant in tail to make leases, which neither his estate nor the law would allow of, (as the lease there was for 300 years:) but upon the other statutes, if all the circumstances thereby required are observed, a lease of part, rendering a proportionable rent, seems to have no inconvenience in it, or be any ways against the true meaning of the statutes.

Co. Lit. 44 b; 3 Keb. 379, 380; 5 Co. 4, 5. (*a*) [But according to the Touchstone, p. 279, if tenant in tail of land let a part of it that hath been accustomably let, and reserve the rent *pro ratâ*, or more than after the rate; this is not a good lease. And it seemeth to be exceedingly doubtful, whether bishops, &c., have the power of dividing their estates, and leasing them out in smaller parcels: for as the *whole* and every part of the estate is no longer answerable for the *whole* and every part of the rent, the security is lessened by such a division; and there may possibly be an entire want of remedy for portions of the rent, by reason of the failure of tenants, deficiency of distress, produce, &c., of the parcels out of which they are payable. When therefore a division is deemed necessary, it hath been judged safest, on account of this *possible* injury to the successor, to apply for the aid of the legislature. See two acts to this purpose in the 34th and 35th of the present king, empowering the Bishop of Ely to grant out estates belonging to his see in several smaller parcels. However, in point of fact, partitions have been made without the sanction of parliament, and that under the opinion of some of the ablest lawyers in the profession. *Ideo quære.*] ‖ But this question, so far as respects ecclesiastical persons in this particular point, is now at rest; for by 39 & 40 G. 3, c. 41, "In all cases where any honours, castles, manors, messuages, lands, tithes, tenements, or other hereditaments, being parcel of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, having any spiritual or ecclesiastical living or promotion, and having been anciently or accustomably devised by one lease under one rent, or divers rents issuing out of the whole, now are, or shall hereafter be demised by several leases to one or several persons, under an apportioned or several rents, or where a part only of such honours, manors, &c., are or shall be demised by a separate lease or leases, under a less rent or rents than was or were accustomably reserved for the whole by such former lease, and the residue thereof is or shall be retained in the possession or occupation of the lessor or lessors, the several and distinct rents reserved on the separate demises of the several specific parts thereof comprised in and demised by such several leases, shall be deemed and taken to be the ancient and accustomed rents for such specific parts respectively, within the intent and meaning of the acts 32 H. 8, c. 28; 1 Eliz. c. 19, 13 Eliz. c. 5, and 14 Eliz. c. 11."

§ 2. "Provided, That nothing herein contained shall extend to confirm or render valid any demise made before the passing of this act, unless the several rents reserved upon the separate demises of separate parts of tenements, theretofore accustomably demised under one entire lease, shall be equal to or more than the rent or rents theretofore accustomably reserved on the entire demise of the whole, or in case the whole should not be demised, but part reserved in the possession of the lessor or lessors, unless the rents reserved on the parts demised should be so far equal to or more than the whole amount of the ancient rent or rents, that the part not demised should be sufficient to answer the difference."

§ 3. "Provided, That where the whole of any such honours, castles, manors, messuages, lands, tithes, tenements, or other hereditaments, accustomably demised by one lease, shall be demised in parts by several leases after the passing of this act, the aggregate amount of the several rents which shall be reserved by such separate leases, be not less than the old accustomed rent or rents theretofore reserved by such entire lease; and that where a part only shall be so demised by any such separate lease, and the residue shall be retained in the possession of the lessor or lessors, the rent or rents to be reserved by such separate lease or leases, shall not be less, in proportion to the fine or fines to be received on granting such lease or leases, than the rent or rents accustomed to be reserved for the whole of the said premises, was in proportion to the fine received on granting the last entire lease."

§ 4. "Provided, That no greater proportion of the accustomed rent be reserved by any separate lease hereby confirmed or allowed to be granted, than the part of the

premises thereby severally demised will reasonably bear and afford a competent security for."

§ 5. "Provided, That where any specific thing, incapable of division or apportionment, shall have been reserved or made payable to the lessor or lessors, his or their heirs or successors, either by way of rent, or by any covenant or agreement contained in any such entire lease, the same may be wholly reserved and made payable out of a competent part of such lands or tenements demised by any such several lease as aforesaid; and in case, in any lease already granted, and intended hereby to be confirmed, any such provision shall appear to have been made for the payment and delivery of any such sum or sums of money, stipends, augmentations, or other things as aforesaid, the same shall be deemed and taken to have been lawfully made, in case the lands and tenements charged therewith shall be of a greater annual value than the payment or other things so charged, exclusive of the rent or other annual payment reserved to the lessor or lessors."

§ 6. "Provided further, That nothing herein contained shall extend to authorize or confirm any lease whereon no annual rent is or shall be reserved to the lessor or lessors, his or their successors or assigns."

§ 7. "Provided, That this act, or any thing herein contained, shall not authorize the reservation or payment of any rent or rents upon any such several lease made or to be made under authority of this act, by any master, provost, president, warden, dean, governor, rector, or chief ruler of any college, cathedral church, hall or house of learning, in the universities of Oxford and Cambridge, or by the warden or other head officer of the colleges of Winchester and Eton, in any other manner or proportions than is required 18 Eliz. c.

§ 8. "Provided also, That where any such accustomably entire leases as aforesaid shall have usually contained covenants on the part of the lessee or lessees for the payment or delivery, or shall have in any other manner subjected or charged such lessee or lessees to or with the payment or delivery of any sum or sums of money, stipend, augmentation, or other thing, to or for the use of any vicar, curate, schoolmaster, or other person or persons, other than and besides the lessor and lessors, and his or their heirs or successors, all or any such leases as shall hereafter be granted of the same lands or tenements in severalty as aforesaid, shall and may lawfully provide for the future payment and delivery of such sum or sums of money, stipends, augmentations, or other things, by and out of any part or parts of the lands or tenements accustomably charged therewith, not being of less annual value than three times the amount of the payment so to be charged thereon, exclusive of the proportion of rent or other annual payments to be reserved to the lessor or lessors."

§ 9. "Provided always, That nothing in this act shall extend to establish or confirm the claim of any vicar, curate, schoolmaster, or other person or persons, to any such sum or sums, salary, stipend, or other thing as aforesaid, the payment and continuance whereof shall depend only on the will of the person or persons, or body or bodies politic or corporate, granting or renewing such lease or leases respectively."

§ 10. "And where any person or persons now holding, or who shall hereafter hold, any such lease or leases as in this act mentioned, shall or may hold the same, or any specific part of the lands or tenements thereby demised, in trust for any other person or persons, or for any body or bodies politic or corporate, or shall have granted any under lease or under leases of any specific part or parts of his, her, or their respective holdings, and be under any covenant or engagement for renewal thereof to any other person or persons, body or bodies politic or corporate, when and as often as his, her, or their own lease or leases shall be renewed, it shall and may be lawful for such person or persons as first mentioned, at any time or times after the passing of this act, to surrender his, her, or their lease or leases, in order that separate and distinct leases may be granted by the original lessor or lessors of such specific parts of the same premises as shall have been held in trust, or subject to such covenants or engagements for renewal as aforesaid, to the respective under lessees and *cestui que trusts*, upon fair and reasonable terms, subject to an apportionment of the accustomed rent or rents, and other payments, according to the intent and meaning of this act; and every such surrender so made, and the new leases to be granted thereon, according to the intent and meaning of this act, shall be good and effectual in law and equity, notwithstanding such under lessees and *cestui que trusts*, or any of them, shall or may be infants, issue unborn, femes covert, persons absent from the realm, or otherwise incapacitated to act for themselves, provided that such new leases respectively be for the benefit of the several persons entitled to the benefit of such surrendered lease or leases respectively, and be expressly so declared in the body of each such new leases respectively."—Why the

act should be thus limited in its operation; why it should not have been extended to leases made by tenants in tail, and husbands seised *jure uxorum*, and to leases granted by ecclesiastical persons of two or more farms, which have been usually let separately, one cannot possibly see. These defects are the more surprising, because the bill appears from the journals to have been introduced into the House of Commons by a very able lawyer, Mr. Douglass, now Lord Glenbervie.‖

Rule 8. That such Leases must not be made without Impeachment of Waste.

The last rule to be observed in the making of leases upon these statutes is, that they must not be made without impeachment of waste. Though this is expressly provided for in the 32 H. 8, c. 28, only, yet it hath been resolved upon the 13 Eliz. c. 10, and held upon 1 Eliz. c. 19, that the several persons therein respectively mentioned are by the equity thereof restrained from making leases dispunishable of waste: for if, as the preamble speaks, long and unreasonable leases are the chiefest causes of dilapidations, and the decay of all spiritual livings and hospitality, much more would they be so if they were made dispunishable of waste; and therefore those statutes being made to prevent such unreasonable leases for the future, must, by consequence, prohibit the power of committing or suffering waste. But, if bishops be not restrained by 1 Eliz. c. 19, from making such leases, yet they must at least be confirmed by the dean and chapter, otherwise they will be void by 32 H. 8, c. 28.

Co. Lit. 44 b, 45 a; 6 Co. 37 a; Dean and Chapter of Worcester's case, Palm. 468; Comp. Incumb. 833.

And although they are confirmed, yet, if the lessee should go about to commit waste, he may be stopped by prohibition, and attached if he persist in it; for so may the bishop himself, or any ecclesiastical person, if they commit waste, either in cutting down the timber trees, or pulling down or defacing the houses or possessions of the church. And such waste is also a good cause of deprivation. And as the bishop or other ecclesiastical person cannot justify the doing of such waste, other than for reparations, fuel, or such like necessaries, no more can their tenants or lessees, who derive under them.

11 Co. 49, 98 b; 3 Bulstr. 91; Moore, 917; Zaker's case, 2 Roll. Abr. 813; Hob. 36; Drury v. Kent, 3 Inst. 304; Godb. 259; 2 Bulstr. 279.

But, where a prohibition was moved for, to hinder a parson from the digging of lead and coal mines in his glebe, the court denied it, because he having the fee in him in as high a manner as ever any body will have it, if he cannot open the mines, they will never be opened at all. Nor is this opening of mines any cause of deprivation by the canon law: and the reason of prohibiting the cutting down of trees in the church-yard, by 35 E. 1, stat. 2, is, because they were planted in defence of the church, and also because such cutting them down is waste.* And it is said in one book, that the parson hath such an estate in him, that he may maintain an action of waste, for waste in cutting down trees by his termors.

Sid. 152; Lev. 107; Keb. 557, Count de Rutland's case. * They may be cut down for the repair of the chancel or of the church by the stat.

Note: Leases may be made without impeachment of waste two ways: 1. Expressly, by words in the lease, declaring the same; or, 2. Impliedly, by construction of law; as, if a lease be made for life, the remainder for life, this is dispunishable of waste, and so not warranted by the statutes; because in waste the place wasted is to be recovered as well as treble

damage, which the reversioner in this case cannot do, without destroying the intermediate estate for life.

6 Co. 37 ; Cro. Car. 95.

But, if a lease be made to one for three lives, this lease is good, because it is not dispunishable of waste, and the occupant, if any happen, shall be punished for waste within the statute of Gloucester, c. 5, which gives an action of waste against any one that held in any manor for term of life or years ; and an occupant in this case holds for term of life.

6 Co. 37.

|| If in a power to lease estates, including mines opened and unopened, a clear intention appears to embrace all the mines, but a clause is added that no lessee shall be dispunishable of waste ; there, to effectuate the general intention of the power, the latter clause shall not be deemed applicable to the unopened mines.

Campbell v. Leach, Ambl. 748 ; Sugd. Pow. 577, 578.

So, if there be a similar clause in a power to grant leases at rack-rent and building leases, it will be confined to the leases at rack-rent only, because no improvements by building could be made, unless old buildings could be pulled down, trees felled, &c. Indeed it would seem that such a clause in a power to grant building leases only would not restrain the liberty of pulling down the old buildings in order to erect new ones.

Jones v. Verney, Willes, 169.||

(F) Of Leases by Parsons, Vicars, and others, with respect to other Qualifications.

As to leases made by parsons, vicars, and others, having benefices or promotions with cure of souls, these things are to be observed :

1. That parsons and vicars are expressly excepted out of 32 H. 8, c. 28 ; so that they are not, as other sole corporations, enabled by that statute to make any leases to bind their successors without the confirmation of the patron and ordinary, but remain as they did perfectly at common law, for any thing in that statute. 2. That they are not restrained by 13 Eliz. c. 10, from making leases for twenty-one years, or three lives ; but then such leases must not only be confirmed by the patron and ordinary, but must also be made in conformity to the eight rules or qualities mentioned, otherwise they will not bind the successor. 3. They, as well as others, are restrained by 13 Eliz. c. 10, from making leases for any longer time, notwithstanding any confirmation or conformity to the rules before mentioned.

Co. Lit. 44 ; Comp. Incumb. 838.

But it is not necessary that the lessor be a priest ; for if a mere layman be instituted and inducted to a benefice, and make a lease for 21 years, or three lives, which is confirmed by the patron and ordinary, and then the incumbent be deprived *quia merè laicus ;* yet the lease remains good, and shall bind his successor, because it was made by a *parson de facto pro tempore*, whereof the law takes cognisance by the solemnity of his institution and induction ; and the people can take notice of no other. So, if the parson were after deprived for contracting matrimony when the law was that priests could not marry, or for not reading the articles within two months, &c., yet his leases being confirmed by the patron and ordinary remain good against the successor, as well since the statutes before mentioned, as they did at common law before the making thereof ; because being made by a

lawful incumbent *pro tempore existente*, they ought not to be impeached by any subsequent act or neglect of the parson.

Moore, pl. 836; Cro. Eliz. 775; Roll. Abr. 476; Dyer, 292 b; Comb. 202.

But, if he who makes such lease be but a supposed incumbent, or be in a church by a super-institution, or the like seeming title, and so be reputed the legal incumbent, he cannot make a lease to bind after his death, or the death of the true incumbent: therefore, where A was made lawfully bishop of Ossory, in the time of Edw. 6, and after, in the time of Queen Mary, B was consecrated bishop of that diocese, living A who was not deprived, and then B made a lease of parcel of the possessions of the bishopric, and then A died, and B survived him about three years; yet after his death it was adjudged, that this lease should not bind the successor, because it was a voluntary act, and tended to the impoverishing of the successor, and A not being deprived, continued bishop still; so that the consecration of B was a mere nullity, and never made him bishop of that diocese. But yet they held, that all judicial acts done by B as institutions, certificates, &c., were good, because they were necessary, and could then be performed by no other.

Cro. Ja. 552; Palm. 22, Bishop of Ossory's case.

So, if one were appointed bishop of a diocese, but never ordained or consecrated, (as it is said, in the time of Ed. 6 some were not,) then leases made by such bishops, though confirmed by the dean and chapter, will not bind their successors, because for want of ordination and consecration they are no bishops at all, and, consequently, their acts null and void in themselves.(*a*) But, if one were lawful bishop at the time of making such lease, no deprivation after will avoid the lease, because there was nothing wanting when it was made, and the deprivation after shall not impeach that which was good in itself before.

Bro. tit. *Leases*, 68. ‖ (*a*) As there can be no vacancy till consecration, it would seem to follow, that though an incumbent on a living be elected bishop, yet a lease made by him as such incumbent before consecration will be good to bind the successor. Rex & Reg. v. Bishop of London, Carth. 313.‖

If the incumbent, be he clerk or layman, were under the age of twenty-one years at the time of making a lease, yet shall not his successor avoid it for this cause, if there was nothing else wanting; for though he ought not to have been admitted under age, yet after such admission he continued rightful parson till deprived, and then all acts done by him in the mean time continue good and unavoidable; and in his politic capacity, as parson, his age is not material or imputable.

Bro. tit. *Age*, 80.

‖ By 1 W. & M. c. 16, § 2, no lease really and *bonâ fide* made by any person simoniac or simoniacally promoted to any deanery, prebend, or parsonage, or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy unto, or having notice of such simony, shall be impeached or avoided for or by reason of such simony, but shall be good and effectual in law, the said simony notwithstanding.

In an action for use and occupation by an incumbent against a tenant of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff in order to avoid his title. So, in an action for money due as a composition for tithes.

Cooke v. Loxley, 5 T. R. 4; Brooksby v. Watts, 6 Taunt. 333.‖

(F) Leases by Parsons with respect to other Qualifications.

Though leases made by parsons or vicars be in all respects well made, yet by non-residence they become void by virtue of the statute 13 Eliz. c. 20, which is as followeth; viz., "That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, be it enacted, That no lease hereafter to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be orderly resident, and serving the cure of such benefice, without absence above eighty days in any one year, but that every such lease immediately upon such absence shall cease and be void, and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish; and that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void.

‖ This and the other acts of Queen Elizabeth, so far as they relate to this point of residence, are repealed by 57 G. 3, c. 99.‖ *Vide* 14 El. c. 11, § 14.

§ 2. "Provided, That every parson, by the laws of this realm allowed to have two benefices, may demise the one of them, upon which he shall not be then most ordinarily resident, to his curate only that shall there serve the cure for him; but such lease shall endure no longer than during such curate's residence without absence above forty days in any one year."

This statute, though it extends only to those who have the cure of souls, yet by reason of the multiplicity of parsonages and vicarages in England, hath been held to be a general law, whereof the judges are bound to take notice, without pleading it.

2 Roll. Abr. 465; Yelv. 106; 1 Brownl. 208; 4 Co. 120.

Upon an action of trespass brought, and not guilty pleaded, the jury found the defendant vicar of D, and that he such a day leased his vicarage to J S for three years, rendering rent, which J S assigned one acre, parcel thereof, to the plaintiff, and that the defendant was absent several quarters in one year, viz. sixty days in each quarter: it was adjudged for the defendant, that this was such an absence as avoided his own lease within that statute

Yelv. 106; Brownl. 208, Jenning v. Haithwait.

So, it is said to have been adjudged, that if a parson be absent at several times, viz. ten days at one time, and twenty days at another, and so till eighty days be fulfilled in one year, that this is such a non-residence within the statute as shall avoid his lease.

Noy, 116, Sidner v. Calvert.

And yet, where it was found by special verdict, that a parson made a lease of his glebe and tithes, and was absent by the space of eighty days in a year; yet because it was also found that he did upon all occasions resort to his parish, and perform divine service in the church four days in a week, and duly serve the cure thereof, though he lived in another parish, which was a non-residence within the statute H. 8, yet this was not such a non-residence as should avoid his lease within the statute of 13 Eliz. c. 20, for that, they held, must be a non-residence for eighty days together at one time in the year.

Bulstr. 111, Sheppard v. Twoulsie. [This case in Bulstrode hath been since denied to be law: such a construction would entirely defeat the statute; for at this rate an in-

cumbent need be resident only five days in one year. Quilter v. Mussendine, Gilb. Eq. Rep. 228.]

By this it appears, the surest way to avoid the lease (if the case will bear it) is, to allege the absence for eighty days together,(*a*) because then the cure must most certainly be neglected: but since it also appears, that if the cure were not neglected, though the absence were for eighty days in a year at several times, that this should be no avoidance of the lease; therefore the other cases, which hold the absence at several times, till eighty days be accomplished in a year, sufficient to avoid the lease, must be intended such an absence as was accompanied with the neglect of the cure; otherwise, the cases will not be consistent and uniform.

Degg. 126. (*a*) [This allegation is clearly unnecessary. Mills v. Ethridge, Bumb. 210.]

And *note;* Where any lease becomes void for absence above eighty days, no confirmation of the patron and ordinary can save it. [In such case it is merely void, and the lessee cannot maintain an ejectment (*b*) even against a stranger, who enters without any colour of title.] {And the parson himself may, on the ground of the lease being avoided by his own non-residence, recover against his own lessee.}

Degg. 126; Doe v. Barber, 2 T. R. 749. (*b*) ‖ He cannot maintain ejectment, because it is a fictitious remedy founded upon title; but he may maintain trespass, his mere possession being sufficient for that against a wrong-doer. Graham v. Peat, 1 East, 244;‖ {2 East, 467, Frogmorton v. Scott.}

If an information be brought on the statute 13 Eliz. c. 20, or if that statute be pleaded to avoid a lease, bond, or covenant, it ought to be said, not that the incumbent was absent, but also, that he was absent eighty days *et ultra:* for to say eighty days, and nothing more, is not sufficient within this statute, which says above eighty days: for he may be absent eighty days, and come again in the night of the 80th day; and if so, he is no offender within this statute; and therefore it ought to be expressly alleged, and not by implication.

Cro. Eliz. 88, Gosnal v. Kindlemarsh; Cro. Eliz. 490, Earl of Lincoln v. Hoskins.

So, it must also be said, that he was absent eighty days *et ultra* in a year; otherwise it will not be good, for so is the statute expressly.

3 Bulstr. 202, Rudge v. Thomas.

Also, it must be showed that the incumbent was voluntarily absent; (*c*) for if he were absent, or did not serve the cure, by reason of sickness, suspension, or because he was inhibited by the ordinary from serving the cure, or was ejected by any out of the parsonage-house, or upon the account of any other restraint, this is no such absence as will avoid any leases, &c., within these statutes.

Cro. Eliz. 590; Moore, 540; 6 Co. 21; Butler v. Goodal, Cro. Eliz. 100; Collins v. Vaughan, Moore, 448. (*c*)[But it is now settled, that it is not necessary to aver that the absence was voluntary, for if it be otherwise, it is matter of excuse, which it lies upon the parson to show. Mills v. Etheridge, Bunb. 210; Quilter v. Mussendine, Gilb. Eq. Rep. 228. *Note;* A sequestration of a benefice under a *fieri facias* is no impediment to the serving of a cure; so that the non-residence of the incumbent in such a case is a clear avoidance of any lease he may have entered into. Doe v. Mears, Cowp. 129.]

These last cases prove the unreasonableness of the construction that has been made of this statute in the following case: Where a parson, after 13 Eliz. c. 20, made a lease to one, for twenty-one years *à die confectionis*, of lands usually letten, rendering the ancient rent; and this was confirmed by the patron and ordinary; then the parson died; and the question was,

if his death was such a non-residence as that eighty days after being incurred should avoid the lease? Moore reports this case, that the judges were divided in it, and that though judgment was given against the defendant, under-lessee of A in an action of debt brought by A for the rent; yet the reason of it was for his misrecital of the statute, whereby he would have avoided the lease to A, and, consequently, the under-lease to himself. But Cro. reports the case to be adjudged, that the death of the parson was a non-residence within that statute to avoid his leases; for, the court said, the intent of the statute was to provide against dilapidations, and for maintenance of hospitality, and therefore must be intended to avoid leases, not only for non-residence, but also by the death or resignation of the parson; for otherwise dilapidations would be in the time of the successor, and he could not maintain hospitality. And Hale says, this was adjudged, as it is reported by Cro. by the opinion of three judges against one, but says, it was a hard opinion: and therefore (*a*) where the same point came again in question, it was adjudged that the death of the parson was not such a non-residence as should avoid a lease duly made. 1. Because the intent of the statute was only to oblige the parsons to residence, by imposing a forfeiture upon them of a year's value of their benefices if they did not reside, which could not be, if death were a non-residence within that statute; for, immediately upon the death of the incumbent, all the profits of the living, except for supply of the cure in the vacation, belong to the successor; how then could the bishop sequester them for the use of the poor, for a whole year, as the statute directs? 2. It is plain the statute meant a wilful negligence, because it says, *the party so offending;* but death is involuntary, and cannot be punished. 3. The statute of 14 Eliz. c. 11, which allows leases of houses in market-towns for forty years, would be of no effect, if death should be interpreted a non-residence to avoid them. 4. The confirmation of the patron and ordinary would be to no purpose, and their permission to make leases for twenty-one years or three lives, with such confirmation, would be vain and idle, if such leases should continue no longer than during the parson's life; for he might have made them good during his own life, without any such permission or confirmation. 5. These cases above cited prove that the non-residence, within this statute, must be such as is voluntary; and therefore sickness, inhibition by the ordinary, &c., which are involuntary, are a good excuse of non-residence within this statute, and so have been allowed.

Cro. Eliz. 123; Moore, 270, Mott v. Hales. (*a*) 2 Lev. 61; Vent. 244; 3 Keb. 46, 107, 193, Bayley v. Munday.

But for as much as several evasions were found out to frustrate and elude the true intent of the said statute of 13 Eliz. c. 20, therefore, by another (*b*) act of parliament it was provided as followeth; viz. "That whereas sundry evil-disposed persons have defrauded the true meaning of the last-mentioned statute, by bonds and covenants, of suffering other persons to enjoy ecclesiastical livings, and the fruits thereof, for that such bonds and covenants are not in law taken to be leases, although indeed they amount to as much; be it therefore enacted, That all bonds, contracts, promises, and covenants hereafter to be made, for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion, with cure, or to take profits or fruits thereof, (other than such bonds and covenants as shall be made for assurance of any lease heretofore made,) shall be, to all intents and purposes, adjudged of such force and validity, and not otherwise, as leases by the same persons, made of such benefices and ecclesiastical promotion, with cure. And be it

further declared and enacted, That all leases, bonds, promises, and covenants, of and concerning benefices and ecclesiastical livings with cure, to be made by any curate, shall be of no other or better force, validity, or continuance, than if the same had been made by the beneficed person himself, that demised, or shall demise the same to any such curate."

(*b*) 14 Eliz. c. 11, § 15, 16.

And by another (*a*) act for the continuance of the said statutes of 13 Eliz. c. 20, and 14 Eliz. c. 11, there is another clause, by way of addition, "That all judgments hereafter to be had, for the intent to have and enjoy any lease contrary to the said statutes or any of them, shall be deemed void in such sort as bonds and covenants are appointed to be void which are made for that purpose."

(*a*) 43 Eliz. c. 9, § 8.

The statute of 13 Eliz. c. 20, as appears by the express words thereof, extends only to leases to be made after that statute: therefore, where a parson made a lease for sixty years before the 13 Eliz., which was confirmed by the patron and ordinary, and then the parson died, and his successor, after the statute of 14 Eliz. c. 11, gave a bond that the lessee should enjoy the lease during the term, and after became non-resident for above eighty days in one year, and so would have avoided both the lease and the bond; yet in an action of debt brought thereupon, it was adjudged, that neither of them were within either of those statutes; for as to the lease, that being made and duly confirmed before 13 Eliz. c. 20, was good at common law; and then the bond given for enjoyment of such lease, though it were given after 14 Eliz. c. 11, yet was neither within the words nor intent of that statute, which extends only to bonds given after that statute, for enjoyment of leases, contrary to 13 Eliz. c. 20, which this lease, that was made before, cannot be said to be: nor could the successor himself avoid this lease, so that the bond given for the enjoyment thereof cannot be unlawful.

Also, the said statute of 13 Eliz. c. 20, extends only to avoid leases for non-residence or absence for above eighty days in one year, and the statutes of 14 Eliz. c. 11, and 43 Eliz. c. 9, avoid only bonds, covenants, promises, and judgments, made or given for enjoyment of ecclesiastical livings or benefices, become void for such non-residence or absence, and not where the living, &c., become void by death, resignation, or deprivation, &c., which are voidances at common law.

Comp. Incumb. 847.

Therefore, where a parson covenanted with A that he should have his tithes for thirteen years absolutely, without saying, if he should so long live, and continue incumbent, and afterwards, before the expiration of the term, resigned his benefice, and so became absent or non-resident for above eighty days; and his successor, after induction, ousted A of the tithes; upon which he brought an action of covenant against the first parson, who pleaded the statute of 14 Eliz. c. 11, in bar; it was adjudged by Coke, Dodderidge, and Haughton, that though this lease was void by the resignation, yet the action well lay upon the covenants in the lease; for the 13 Eliz. c. 20, avoids leases only where the parson becomes absent or non-resident for above eighty days in a year; and the 14 Eliz. c. 11, as appears by the preamble, intended only to avoid bonds, covenants, and promises made or given for the enjoyment of ecclesiastical livings, or the fruits thereof, upon pretence that they were not leases within the said statute 13 Eliz. c. 20, and

enacts, that they shall be of such force and validity, and not otherwise, as leases by the same persons would have been, and so extends to avoidance thereof for absence, or non-residence, for above eighty days only, as the other act did the leases themselves; but this resignation was an immediate voidance of the lease at common law, and an action thereby attached in the lessee immediately, for breach of the covenant before the avoidance, by absence or non-residence for above eighty days, by force of the statute had incurred. And these statutes did not intend to intermeddle with avoidances at the common law, but left them as they were before, and, by consequence, this resignation, which defeated the interest of the lessee at common law, was a breach of the covenant, for which the action well lay. So, they held, if the parson had died, or been deprived, &c., which would also in consequence have defeated the interest of the lessee; yet an action of covenant would have well lain against him or his executors; because the covenant was absolute, and this avoidance of his interest was an avoidance at the common law, and not by force of either of the statutes; and then at common law such lease or covenant is good, and the parson, at his peril, is to take care that the lease or covenant be made good according to his agreement; as, if tenant for life covenants that another shall enjoy his lands for twenty-one years, and afterwards commits a forfeiture, yet he shall be bound by his covenant.

3 Bulstr. 202; Roll. Rep. 403, Thomas v. Rudge.

But, if a parson makes a lease for thirty or forty years, if he so long live, with covenants for enjoyment thereof accordingly, this so qualifies the lease and covenant, that though his death will determine the lease, yet it will be no breach of the covenant. But, as by such lease and covenant he takes upon him to do no other act whereby to avoid the lease; therefore, if he resigns, or otherwise voids the living, an action of covenant will lie against him. But, if this clause were added, viz., "*and shall so long continue parson*," then this clause leaves him at liberty to avoid it by resignation, non-residence, or otherwise, because it qualifies the lease to continue no longer than whilst he continues parson, and in the mean time leaves it in his election how long or short a while that shall be.

Brownl. 125, Wheeler v. Heydon, *per* Haughton.

A clerk entered into an obligation, the condition of which was, that he being presented, instituted, and inducted to a benefice then void, should, upon request of the patron, resign; and he afterwards made a lease to the patron, and then was absent for above eighty days together, whereby the lease became void; and then being requested by the patron to resign, which he refused, the patron brought an action of debt upon the bond, to which the defendant pleaded the statute of 13 Eliz. c. 20, and 14 Eliz. c. 11, and that after his induction he let the lease to his patron the plaintiff, and then was absent above eighty days together, and averred that the obligation was made for the enjoying of the benefice let by the said lease, and to the intent to compel him not to avoid the lease by absence, for fear of being required to resign, and demanded judgment, &c., upon which the plaintiff demurred; and the whole court held the plea good, and the averment to be very apt, because the obligation being made generally to resign upon request, might well be averred to be for this particular purpose, and so void.

Moore, 641, Webb v. Hargrave.

This case fully proves, that the bonds which have been attempted and

taken from parsons upon making leases, with condition that they should duly serve the cure, and not be absent from their benefice by the space of eighty days when they appear, or can be averred to be given for security of leases made by such parsons, will be void within these statutes, and no recovery allowed thereupon. But bonds, with condition not to resign, or do any other act which should cause an avoidance at common law, though they are made for security of such leases, yet they will be good and binding, unless the parson can show an avoidance by absence for above eighty days, and also aver that the bond was given to prevent such avoidance; for otherwise, if the lease becomes void by resignation, or other voluntary act of the parson, (except such absence for above eighty days,) the bond is presently forfeited at common law; and the statutes will no more relieve upon account of any absence after, than they would against a covenant for that purpose. But, if such bonds were given, with a condition in the disjunctive, not to be absent above eighty days, nor to resign or do any other act, which should cause an avoidance of the lease at common law; *quære*, whether the whole bond be absolutely void, or if it shall be good or bad, according as the avoidance first happens to be either upon these statutes or at common law?

Cro. Eliz. 88, 490.

A parson let his rectory for three years, and covenanted that the lessee should have and enjoy it during the said term, without expulsion, or any thing done or to be done by the lessor; and was also bound in an obligation to the lessee for performance of covenants; and afterwards, for not reading the articles, was *ipso facto* deprived by the statute 13 Eliz. c. 12, whereby the lease became void: yet it was the opinion of all the justices, that the bond was not thereby forfeited, because the lessee was not ousted by any act done by the lessor, but rather for a nonfeasance, and so out of the compass of such covenant; as, if one be bound not to do any waste, permissive waste is not within the danger of it. But otherwise it would have been, if the lessor had covenanted not to omit the doing of any thing whereby the lease should become void.

4 Leon. 38, 39, pl. 104; Degg. 128; Comp. Incumb. 848.

So, if one be bound by obligation to make such a lease for twenty-one years, this is good, and shall bind him: but then it seems that if this lease become afterwards void for non-residence, and the bond be put in suit, if it be averred that the bond was given for security of such lease against non-residence, this will avoid the bond also.

3 Bulstr. 203; Comp. Incumb. 848.

If the parson's lessee assign over his lease to another, and the parson be absent above eighty days in a year, the lessee may also plead the statutes of 13 Eliz. c. 20, and 14 Eliz. c. 11, for the avoiding of his own assignment and agreement with the assignee; because, if he assigned over no more than what the parson demised to him, such assignment must be subject to the same determination the original lease itself was; and if that be determined, he who claims under the parson may as well show it in avoidance of his own assignment, as the parson might in avoidance of his own lease.

Bulstr. 111; Comp. Incumb. 847.

It hath been held, that if a parson makes a lease for years, which after becomes void by the statutes for non-residence, and there is an obligation for performance of covenants, although there be some covenants which do not concern the lease comprised in the indenture, yet is the bond entirely

void; otherwise all the meaning of the statute would be defrauded by putting a lawful covenant into the indenture.

Cro. Eliz. 529, 530, Lee et Ux. v. Colehill.

Though the statutes aforesaid make void leases, bonds, &c., where the parson is non-resident, and neglects to serve the cure for above eighty days together, yet such leases or bonds, &c. are not void *ab initio*, but only from the time that such absence of eighty days shall be completed: for the words of the statute are, *shall endure no longer but while the lessor shall be ordinarily resident*, (therefore so long it shall endure,) *and serve the cure without absence above eighty days in one year; but that every such lease, immediately upon such absence, shall cease and be void:* therefore, till such absence of above eighty days be accomplished, the lease is good and in being.

Comp. Incumb. 848; Degg. 124.

Accordingly it hath been adjudged, that if such lease by indenture be made, containing covenants on the lessor and lessee's part, and after by absence for above eighty days both the lease and covenants become void; yet an action of covenant well lieth for the lessor or lessee, for any covenant broken before the end of the eighty days' absence. But, if the lessor was absent for above eighty days, though part of the time incurred pending the action, and before plea pleaded, yet it is a sufficient absence, and may be pleaded in avoidance of the lease.

Cro. Eliz. 78; Wallis v. Cox, Ibid. 245; 3 Leon. 102.

Therefore, if in such case an action of covenant be brought, the defendant must not only plead the statutes, which make the lease and covenants void, but must also plead the performance of covenants to the time of the eighty days' absence expired.

Dyer, 372 a, b.

If those statutes are pleaded to avoid any action, care must be taken not only to allege the absence or non-residence fully, but also that the statutes be truly recited: therefore, where the statute of Eliz. was recited with this clause, *tam diu* (where the words are *tam cito*) *quam*, &c. *aut aliqua pars inde venerit ad aliquam possessionem, vel usum inhibitum, vel*, &c., (which words by 14 Eliz. c. 11, are repealed, and appointed to be omitted,) judgment was given against the party for this misrecital, without any regard to the matter in law.

Cro. Eliz. 490, Earl of Lincoln v. Hoskins.

Though the statute of 13 Eliz. c. 20, allow a parson or vicar that hath benefices to demise the one of them, upon which he shall not be ordinarily resident, to his curate, yet it is thought from 14 Eliz. c. 11, that if such curate lease the same over to another, though he himself is not absent above forty days in any one year, if the incumbent or parson be absent above eighty days in the same year, that this shall avoid the curate's lease; because 14 Eliz. c. 11, says, that all leases, bonds, &c., of benefices and ecclesiastical livings with cure to be made by any curate shall be of no other nor better force, validity, or continuance, than if the same had been made by the beneficed parson himself that demised or shall demise the same to any curate. Yet by Tanfield, when a parson leaseth to his curate, who leaseth over, the statute doth not make the lease void by any absence of the parson, but of the curate only for forty days; for otherwise, as he held, the intent of the statute might be easily frustrated, which was that he that served the cure

should be the occupier of the glebe and tithes belonging to the church, and none other: but *quære?*

Comp. Incumb. 843; Leon. 100, St. John v. Pettit.

But admitting that the parson's absence for above eighty days should not avoid the curate's lease, yet we must distinguish who shall be said a sufficient curate for that purpose; and that is only one who is legally admitted by the ordinary of the place, according to the laws of the land: for otherwise he is no curate, although he serves the cure, and is resident; so that if the parson should make a lease of the glebe and tithes to such a nominal curate, yet by the parson's absence for above eighty days the lease will be avoided; and if they should be sequestered, in this case, according to the statute, the parson cannot plead that they are let to his curate, because he is no curate in law, and his having a cure there is an offence against the law, of which it is not reasonable that either the incumbent or curate should take advantage.

Comp. Incumb. 843.

Note; It has been held, that a parsonage may be a manor; as, if, before the statute *quia emptores terrarum*, the parson, with the patron and ordinary, had granted parcel of the glebe to divers persons to hold of the parson by divers services; this makes the parsonage a manor. And if the same be a copyhold manor, then, notwithstanding all the statutes before rehearsed, parsons and vicars, as well as all other ecclesiastical persons, may grant copies for life, in tail, or in fee, according to the custom of the manor: for the copyholder doth not derive his estate out of the estate or interest of the lord only, but from the custom, and is said to be in by the custom, without any regard to the person of the grantor. And these grants by copy are good without the confirmation of the patron and ordinary, and are not avoided by the non-residence or death, &c., of the parson. Neither do any of the statutes aforesaid extend to rectories and tithes that are impropriated and become lay-fee, and remain in the hands of laymen, but they may do with them as with any other inheritance, whereof they are seised. But appropriations in the hands of bishops, colleges, or other ecclesiastical persons are liable to the aforesaid statutes and rules, as other inheritances whereof they are seised: and so are impropriations, if by presentation, &c., the vicarage be restored to the church out of which it was endowed; for by such presentation they are become for ever after presentable, and the impropriation is destroyed.

Comp. Incumb. 848; 4 Co. 23, 24; Gilb. Ten. 197.

In debt upon bond to perform covenants in a lease made by the defendant, the parson, to the plaintiff, the defendant pleaded, that the lease was void by the statute of 14 El., because he was absent from his benefice above the space of eighty days; part of which time incurred pending the action, and before the plea was pleaded. It was the opinion of the court, that the plea was good.(*a*) But exception was taken to the pleading, because the defendant says, that the said church is a parochial church, *cum curâ animarum*, but does not say, that it was so at the time of the lease and obligation made; for it may be, that at the time of the lease there was a vicar, and then it was not *cum curâ animarum*. And upon that exception judgment was given for the plaintiff.

3 Leon. 102, Coxe's case. (*a*) [As the full statutable time had not incurred at the commencement of the action, and the statute could therefore not *then* attach, this plea

would *now*, it seems, be adjudged bad upon that ground. Evans v. Prosser, 3 T. R. 188. Whether, *at law*, a clergyman may plead his non-residence in order to discharge himself of the obligation of his contract, is a point which doth not appear to have been yet judicially determined. Whether, *in equity*, he shall come forward as plaintiff, and insist upon the breach of a positive law, and a neglect of his pastoral duties, in avoidance of an agreement fairly entered into, is a point, one would think, too clear to admit of a doubt. And yet an attempt of this kind was not long ago made by Mr. William Atkinson, the parson of Hillington, in Norfolk, who filed a bill in the Exchequer for an account of tithes, and to set aside a composition he had entered into with his parishioners, (among whom was his patron,) upon the ground that such composition was void, because, in the words of his bill, "*he was absent from Hillington and without being resident therein or serving the said cure for above four-score days in one year after the signing of the agreement of the* 14*th of October*, 1784;" (the composition he had entered into with his parishioners;) "*and that he was absent above four-score days in* 1785, *and before the* 10*th of October in that year, and had not any other benefice during all that time.*" His bill was dismissed with costs. Atkinson, Clk. v. Sir Martin Browne Folkes, and others, July 13, 1792.] ‖ It hath since been determined at law, that it is competent to a clergyman to show his breach of duty in this respect in avoidance of his contract; it being the intent of the legislature, that the lease should be wholly cut down and done away by non-residence. Frogmorton v. Scott, 2 East, 467.‖

Debt upon a bond with condition to pay such a sum, the defendant pleads the statute 14 Eliz. c. 11, that all covenants, bonds, &c., made for the enjoying of leases made of spiritual livings by parsons, &c., should be void, and avers that his bond was made for the enjoying of such a lease. But, because the condition was expressly for payment of money, the justices held it clear law, that the bond was good, and out of the statute: and so by this case it appears, that such averment will not hold good against an express condition to another purpose. And this differs from Hargrave and Webb's case, which was only to resign generally on request, and therefore might well and consistently be averred to be to the intent to compel him not to avoid the lease by absence, for fear of being required to resign.

Godb. 29, pl. 38, Marrow's case.

‖ By 57 Geo. 3, c. 99, § 32, "All contracts or agreements made for the house of residence, or the buildings, gardens, orchards, and appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person shall be required by order of the bishop to proceed and to reside therein, or which shall be assigned or appointed as a residence to any curate by the bishop, shall, upon a copy of such order, assignment, or appointment being served upon the occupier thereof, or left at the house, be null and void; and a copy of every such order, assignment, or appointment shall immediately on the issuing thereof be transmitted to one of the church-wardens of the parish, or such other person as the bishop shall think fit, and be by him forthwith served on the occupier of such house of residence, or left at the same," &c.‖

(G) Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons: And herein,

1. *Where Confirmation is necessary either in respect of the Leases or Estates, made, or of the Persons making the same.*

As to this it is to be observed, that no confirmation whatever of any lease or estate made by ecclesiastical persons not conformable to the eight rules or qualities before mentioned, will bind the successor, except only in the case of the concurrent lease: for that not being construed to be within the restraint either of the 1 Eliz. c. 19, or 13 Eliz. c. 10, remains as it did before at common law; and as at common law confirmation was necessary to make

such lease good against the successor, not being warranted by 32 H. 8, c. 28, (unless the old lease were surrendered or expired within one year after the making of the new lease,) so it is still, and with confirmation will bind the successor. This therefore seems to be the chief, if not the only use of confirmation, as to any persons allowed to make leases within 32 H. 8, c. 28. But there appears this difference between concurrent leases made by archbishops or bishops upon the 1 Eliz. c. 19, and concurrent leases made by other ecclesiastical persons on the 13 Eliz. c. 10, for upon the 1 Eliz. c. 19, the concurrent lease is not restrained to any certain time before the expiration of the first lease; but may be made three, four, five years, or more, before the expiration thereof, so that both leases in the whole do not exceed twenty-one years, upon the construction before taken notice of, that the second lease is void, or at least good by estoppel only, for so many years as are then to come of the first lease: but concurrent leases to be made by any of the ecclesiastical persons within the restraint of 13 Eliz. c. 10, will not be good to bind the successor, unless the former lease for years be surrendered or expired within three years next after the making of such new lease: and this is expressly provided for, not by the 13 Eliz. c. 10, but by the 18 Eliz. c. 11, as hath already been shown.

Comp. Incumb. c. 44; Co. Lit. 44, 45.

We are next to consider where confirmation was necessary at the common law, and where it continues so at this day, in respect of the persons making any leases or grants of their ecclesiastical possessions. The persons who were restrained by the common law from making any leases, grants, or estates, to bind their successors without confirmation, were only sole corporations, as bishops, abbots, deans, parsons, vicars, prebendaries, and such like; for corporations aggregate might make what leases they pleased, without confirmation of any other persons whatsoever; but the prudence of the common law never thought fit to trust such sole corporations with any alienation or disposition of their possessions to bind their successors, without the concurrence and confirmation of other persons. And though bishops and abbots were construed to have the whole estate and right of the land in themselves, which parsons, vicars, prebendaries, and such like, had not, yet as to the binding their successors they had no more power than the others, without the concurrence and confirmation of the persons substituted and appointed by law for that purpose.

3 Co. 75, 10 Co. 60, a.

And where such sole corporations make any concurrent lease upon the statutes before mentioned, the law continues the same at this day, and they must be confirmed in the same manner as any other leases or estates made by the same persons must have been at the common law.

Comp. Incumb. *ubi sup.* Co. Lit. 44.

So also parsons, vicars, &c., can make no lease at this day, though it be with conformity to the eight rules before mentioned, to bind their successors, without confirmation of the same persons who by common law were required to confirm all leases, grants, or estates made by them; for they are expressly excepted out of 32 H. 8, c. 28, and consequently, continued as they were at common law till 13 Eliz. c. 10, imposed a total restraint on them, as well as all other ecclesiastical persons, to make leases to bind their successors for any longer term than twenty-one years, or three lives. And though by that statute they are left at liberty, as well as other ecclesiastical persons, to make

such leases, yet having no ability by 32 H. 8, c. 28, to make them solely, as other sole corporations had; therefore, to make good even such leases against their successors, they must have the confirmation of the same persons, and in the same manner, as they must have had at the common law before the making of any of those statutes.

Co. Lit. 44 b; Cro. Eliz. 18; Comp. Incumb. *ubi sup.*

The grants of ancient offices belonging to ecclesiastical persons are not within any of the statutes before mentioned, but remain as they did at common law, and therefore may be granted with the ancient fee: but then all such grants must be confirmed to bind the successor, because they must have been so at the common law.

10 Co. 60. Vide tit. *Offices.*

2. *What Persons are to confirm such Leases or Estates, and in what manner.*

As to the persons who are to confirm such leases or estates, we must take notice that this varies according to the nature of the persons who make such leases, and the nature of the title of the persons who are to confirm the same.

[It is said by Jones, J., in argument, that a recusant, though disabled to present, shall yet be patron to confirm the lease of the incumbent. Sir W. Jones, 22.]

Therefore, if a parson makes a lease for three lives, or twenty-one years, or less, observing the rule before mentioned, this is to be confirmed only by the patron and ordinary, and no confirmation of the dean and chapter is required thereto; for they have nothing to do with that which the bishop doth, as ordinary, in the lifetime of the bishop.

Co. Lit. 300 b; Bro. tit. *Leases*, 64.

But, if the bishop be patron of the church in right of his bishopric and also ordinary, then the dean and chapter ought likewise to confirm all leases made by the parson, because in such case the advowson of the church is parcel of the bishopric, which cannot be charged to bind the successor without the concurrence and confirmation of the dean and chapter; and how far the successor of the parson will be bound in such case, will appear hereafter.

Bro. tit. *Leases*, 64, Co. Lit. 300 b.

So, where a priest in the cathedral church of Wells, being parson imparsonee of the church of W, made a lease by indenture for 100 years before 13 Eliz. c. 10, rendering rent to him and his successors; and this was confirmed by the dean and chapter only, without any confirmation of the bishop, who was patron and ordinary; then the parson died, and his successor accepted the rent, and after, before 13 Eliz. c. 10, made a lease for forty years, which was confirmed by the bishop, dean, and chapter; it was adjudged, that the first lease was *ipso facto* void and determined by the death of the parson who made it, so that no acceptance of the rent by the successor after could make it good, for want of the patron and ordinary's consent.

Dyer, 239; Benl. 80, Hodges v. Tucker.

So, where a prebendary in a cathedral church, or an archdeacon, made a lease for years of parcel of their possessions, to which confirmation was requisite, and this was confirmed only by the dean and chapter, without any confirmation of the bishop; it was held, this lease should not bind the succeeding prebendary or archdeacon, because the bishop is patron and ordinary of every prebend, and may be so of an archdeaconry; and therefore, to make

leases by them good against their successors, the bishop's confirmation ought likewise to be had, as well as the dean and chapter's.

Dyer, 61 b, 106 b, 240 a; Plowd. 529; Roll. Abr. 481; Co. Lit. 300 b.

But upon the books there seems a manifest diversity between the confirmation of the bishop, as patron and ordinary, without confirmation likewise of the dean and chapter, and their confirmation without the bishop's; as also between the resignation, deprivation, or translation, and the death of the bishop, who so alone confirmed as patron or ordinary: for if any dean, archdeacon, prebendary, parson, or vicar, had made any lease for years at the common law, or should make such lease at this day, whereto confirmation is requisite, and the bishop as patron and ordinary, confirms such lease, without any confirmation of the dean and chapter, and then the dean, archdeacon, prebendary, parson, or vicar dies, or is removed, and the bishop collates another as patron and ordinary; yet cannot such incumbent avoid the first lease, though it was not confirmed by the dean and chapter, because he came in purely by the collation of the bishop, as patron and ordinary, without any aid or concurrence from the dean and chapter; and therefore, as Littleton says, ought to hold himself content, and agree to that which his patron and ordinary have done, for he comes in subsequent to such charge. But, as appears by the cases before put, the confirmation of the dean and chapter alone, without the bishop's confirmation likewise, will not be effectual to bind the succeeding archdeacon, prebendary, parson, vicar, &c., because he derives no title under them, nor comes in with their assent or concurrence; for they have nothing to do with the collation of any person, but the bishop does it absolutely, and in virtue of his own power as patron and ordinary; and therefore if such leases want his confirmation, those who come under him may avoid them, notwithstanding any confirmation of the dean and chapter, under whom they derive no title. But because such advowson or right of collation is also parcel of the possessions of the bishopric, and to bind the succeeding *bishop*, the confirmation of the dean and chapter is requisite; as in all other cases where the bishop, who is a sole corporation, makes any disposition of the possessions of his bishopric: therefore without such confirmation of the dean and chapter, the succeeding bishop, or his incumbent, shall avoid such lease. But here another diversity arises between the translation, resignation, or deprivation of the bishop, and his death. In the first case it is held, that the leases, confirmed by him alone, without the confirmation of the dean and chapter, will bind the succeeding bishop, and his incumbent, during his life; but in case of such bishop's death, such leases so confirmed by him alone, as patron and ordinary, will not bind the succeeding bishop or his incumbent. And a diversity is taken where a bishop, &c., makes any estate, lease, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues, which should maintain the successor, there, the resignation, deprivation, or translation of the bishop, &c., is all one with his death; but, where the bishop is patron and ordinary, and confirmeth a lease made by the parson without the dean and chapter, and after the parson dieth, and the bishop collateth another, and then is deprived, translated, or resigns, yet his confirmation remaineth good; for, says my Lord Coke, the revenues that are to maintain the successor are not thereby diminished. But this seems a very precarious reason; and a better reason of the diversity seems to be this; that when the bishop, as patron and ordinary, has by deed under his hand and seal subscribed his confirmation of the lease, this ought to be binding

upon him, at least during his own life; and therefore though he be afterwards translated, deprived, or resigns, yet, since these are either by his own immediate acts, or occasioned by his default, it is not reasonable they should be allowed to void or derogate from his own acts, which otherwise would have bound during his life; for the law never permits any to avoid or derogate from his own acts. But these reasons have no place after the bishop's death, for then, his confirmation is at an end, and can be no longer binding on his successor, since he had no power to charge the possessions of the bishopric any longer than during his own life, without concurrence and confirmation of the dean and chapter, who are by law substituted and appointed to that purpose.

Dyer, 356 a, b; Leon. 235; Co. Lit. 329; Roll. Abr. 479; 2 Bulstr. 290; 11 H. 6, 9; Lit. § 548; Co. Lit. 343 b.

But yet it is most advisable to have the confirmation likewise of the dean and chapter upon such leases made, and in several books their confirmation is either pleaded or admitted, since without it the lease cannot bind any longer than during the bishop's life who so confirmed it.

Dyer, 106 b, 221 b; Plowd. 528; Bro. tit. *Leases*, 64; tit. *Confirmation*, 21, 30.

In some cases the confirmation of the patron is necessary, and in some not: wherein this diversity is taken in the books, that such sole corporations, as have not the absolute fee and inheritance in them, as prebendaries, parsons, vicars, and such like, if they make any leases or estates, there, to bind their successors, the patron must confirm the same; but such sole corporations as have the whole estate and right in them, as bishops, abbots, &c., or such corporations aggregate as have the whole fee and inheritance in them, as dean and chapter, master, fellows, and scholars of any college, hospital, &c., these may make leases to bind their successors, without any confirmation of the patron or founder, though the bishop, abbot, dean, master, &c., were presentable; and the reason of this diversity appears in the nature of the right with which each is invested.

But, if a parsonage or vicarage be a donative, then the confirmation of the patron alone is sufficient to all leases, &c., made by the parson or vicar, and shall bind the successor without the confirmation of any other.

Roll. Abr. 481; Dyer, 273.

If there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: as, if a parson be patron of the vicarage of the same church, and the vicar make a lease, confirmed by the parson and ordinary, this is not good without the confirmation of the patron of the rectory also, because both have an interest in the possessions of the vicarage.

Co. Lit. 300 b; Comp. Incumb. c. 44.

If the bishop of A be patron of the church presentative of B, which lies within his diocese, and this be the corps of a prebend in the church of A; and the bishop of A be also patron of the church of C, which is also presentative, and lies in the diocese of the church of D, and afterwards the church of C be lawfully annexed and united by the assent of the bishops, deans, and chapters of both dioceses, to the said prebend of B, and afterwards the bishop of A collate J S to the said prebend, which now by the union consists of both churches, and instal him in the cathedral church of A, and then the prebendary make a lease for years, which is confirmed by the bishop, dean, and chapter of A, and not by the bishop of D, yet this is a good confirma-

tion; for by the union the bishop of D hath annexed the church of C to the prebend of B, and so hath deprived himself of the power of confirmation as ordinary; for after the union, the prebendary is invested in both churches by his instalment, without any presentment, admission, institution, or induction to the church of B or C.

2 Roll. Abr. 479, Leigh v. Hallier; Cro. Eliz. 587, Dr. Herbert v. Munday; Sid. 57; Keb. 280, Gie v. Rider.

If the dean of any cathedral church make a lease or grant of any of his possessions, whereof he is sole seised, to bind his successors, and confirmation be necessary thereto; this must be confirmed by the bishop and chapter of the same church, and not by the king, although he be the patron of such deanery; because, as hath been said, the dean and chapter have the whole fee and inheritance in themselves, and then the patrons concurrence or confirmation is not necessary. But it seems to be a doubt, whether the confirmation of the bishop be necessary to such grant or lease; and several books seem to hold, that the confirmation of the chapter alone, without the bishop, is sufficient to make good the dean's leases or grants that need confirmation. But yet it is laid down as a rule in the Parson's Counsellor, that the bishop's confirmation, as well as the chapter's, is necessary to all leases and grants made by the dean; and what is said by Fitz., that the bishop and chapter are in law looked upon but as one body, seems also to favour this opinion; for it is reasonable that the whole body should consent to the granting of their possessions, and not that the bishop, who is the head of the body, should be unconcerned therein; also, the possessions of the dean are said to be derived from and carved out of the bishopric, and the bishop, *de jure*, is said to be patron of the deanery, which are all strong arguments to prove the bishop's confirmation necessary, though no book case can be found expressly to warrant it, but rather the contrary, as appears by the cases first cited, wherein no notice is taken of the bishop's confirmation, or that it was necessary; *ideo quære?*

Comp. Incumb. c. 44; Dyer, 40 b, 273 a, b, 349, pl. 18; Plowd. 538; Roll. Abr. 478, 481; Degg. 120; F. N. B. 194; 3 Co. 75 b; 17 E. 3, 40; Regist. Orig. 230.

But, if such deanery be merely donative, then the king's consent and confirmation, as patron, must be obtained, and that without the bishop's confirmation is sufficient, as in all other donatives, wherewith the bishop has nothing to do.

Comp. Incumb. *ubi sup.*

The dean of Wells might anciently have passed his possessions belonging to his deanery, with the assent of the chapter, without the bishop's confirmation; afterwards, the deanery was surrendered by the dean thereof, with all the possessions thereunto belonging, and so dissolved by act of parliament: the dissolution was confirmed, and a new deanery erected, and the nomination of a new dean, and his successors, given by the act to the king and his successors; and it was thereby also enacted, that the dean and his successors might demise, grant, or part with any of their possessions, in the same manner and form as the ancient deans might and used to do; in this case, if the new dean make any lease or grant of any of his possessions, the bishop's confirmation was not necessary thereto, but only the chapter's, because that alone was sufficient before; neither is the confirmation of the king requisite, because this is not a mere donative of the king, though he hath the nomination of the dean; and by the statute the new deanery is made of

the same nature as the old one was, which could not be a donative, because the dean and chapter might, without the consent or confirmation of any others, have passed away their possessions.

Dyer, 273; Wallround v. Pollard, Roll. Abr. 478, 481.

It has already been shown, that all leases or grants made by archbishops or bishops, whereto confirmation is necessary, are to be confirmed by the dean and chapter; for the law, not thinking fit to trust the bishop alone with the disposition of his possessions to bind his successors, did for that reason (amongst others) constitute the dean and chapter to give their consent and confirmation to all leases or grants made by him for that purpose.

3 Co. 75; 10 Co. 60 a; 2 Co. 39; 6 Co. 34 b.

But, if a bishop hath two chapters, and makes a lease of any of the possessions of the bishopric, whereto confirmation is necessary, and this is confirmed only by one dean and chapter, this will not bind the successor of the bishop: for both are but one in respect of the bishop, if the bishop is chosen by both. So it is, if a bishop be patron of an advowson in right of his bishopric, and collate a clerk, who makes a lease for years, and the bishop and one dean and chapter only confirm it; this will not bind the succeeding clerk of the succeeding bishop, for want of confirmation by the other dean and chapter. But, though both deans and chapters have used to confirm such leases, yet, if one dean and chapter have surrendered their possessions to the king, and then the bishop or his clerk make a lease, whereto confirmation is necessary, and this is confirmed by the remaining dean and chapter only; this is good, and shall bind the successor; because by the surrender the one dean and chapter is dissolved, and are as if they never had been: and although after such surrender, the dean and chapter, who so surrendered, were again erected, yet confirmation by the other would be sufficient; as was held by the greater part of the justices in Ireland, and by five justices in England, who certified their opinion to be so into Ireland.

Dyer, 58 a, b, 282 b; Noy, 94; Co. Lit. 301; Roll. Abr. 477; Leon. 234; 50 E. 3; Statham, tit. *Assize;* Bishop of Litchfield and Coventry's case, 12 Co. 71; Latch. 237.

If two bishoprics, that were originally distinct, are by lawful authority united, and the usage hath been since the union, that the several deans and chapters have made confirmations severally, viz., each dean and chapter of the leases or grants of the possessions of their respective bishopric, but the charter of union is not extant, or cannot be found; such several confirmation is good; because it shall be intended, by reason of the usage, that the union was made specially, and in such a manner, that, notwithstanding the same, all leases and grants should severally be confirmed as they were before the union: and this, either to prevent confusion, or by reason of the remoteness of the several deaneries; and then *modus et conventio vincunt legem*, and such confirmation by the dean and chapter; of their own original possessions, is good. *Secùs*, if the union were made generally, for then both ought to confirm.

12 Co. 71.

If a bishop hath no dean and chapter, then his grants are to be confirmed by the clergy of his diocese, where confirmation is necessary; for the law will not trust any sole corporation with the disposition of his possessions, as hath been before observed.

Dav. 1; Roll. Abr. 477.

(G) Consent of others to Leases by Ecclesiastical Persons.

Whenever a dean and chapter are to confirm any lease or grant, the dean himself must join with the chapter, and confirmation by his subdean, deputy, or proctor, will not be sufficient: for they have no power to charge the possessions of the church, neither is any stranger capable of being a dean-substitute or proctor, but only one of the chapter.

Comp. Incumb. c. 44.

Therefore, where upon a composition for tithes a parson granted an annuity to the abbey of Battel, and this grant was confirmed by the bishop, dean, and chapter, being patrons; but in the deed of confirmation it appeared that the dean was absent, and did not put his seal thereto, but that the chanter, who was his commissary, did it for him; it was held, that though the dean might have a commissary or deputy to exercise his spiritual jurisdiction, yet that such deputy or commissary cannot charge the possessions of the church.

11 H. 4, 84; Bro. tit. *Corporation*, 17; Dav. 47; Palm. 461; Latch. 237.

A lease was made by the free chapel and college of Windsor under the common seal, but the dean or warden himself was not party to the lease, but one who was his deputy in his absence; and upon a suit in Chancery to set aside the lease, a statute of the college was shown for the authority of the deputy to exercise and perform the office of dean in all things *in person; et collegium, &c.*, yet the judges held, that the confirmation by the deputy was not good, for that he had no authority to confirm this lease by the college statute provided; for that by the word *collegium*, all the possessions of the college were not to be understood, but only the site and circuit of the college, or place of its situation. Which case seems to prove, that if by the statutes of a church or college, the deputy-dean may confirm grants and join in the making of leases, as if the dean himself was present and joined therein, that then such confirmation will be good; for the founder or patron may make what law he pleases for the regulation of the corporation, and when he has invested the deputy-dean with such power, this has the same sanction with any other laws for the regulation of that corporation.

Dyer, 233 b; Comp. Incumb. c. 44; Latch. 251; Palm. 480.

As a deputy-dean, generally speaking, cannot confirm leases, so neither can he who is but a mere commendatory dean, viz., a dean by *recipere in commendam;* for though he may take the profits, because that was one end of his having the deanery *in commendam*, and may, with the chapter, choose a bishop, and also exercise spiritual jurisdiction, and sue or be sued by that name, because those acts are of necessity, and for the advantage of the deanery; yet cannot he confirm leases, for this is merely a voluntary act, and such commendatory dean is but *depositarius*, and not a dean complete. But, if a dean be elected bishop, and before his consecration obtain a dispensation to hold his deanery *in commendam*, such dean may well confirm leases, &c., and if he be translated to another bishopric, and after his election, and before consecration, obtain a dispensation to hold the same deanery *in commendam* with his second bishopric, his old title remains; and confirmations, and other acts done by him as dean, are as good in law as if he had never been made bishop: for there is a great difference between a *recipere in commendam*, and *retinere in commendam;* the one comes in purely by virtue of the dispensation, and has no other title; the other comes in legally at first as dean, and by virtue of the dispensation is only enabled

to continue so still; for that gives him no original new title, as in the other case, and therefore he is as much dean as he was before. And the same distinction holds between *recipere* and *retinere in commendam*, in case of bishops; for a mere commendatory bishop in the *recipere* cannot confirm leases, &c., but in such case the archbishop is to do it. Also, the guardian of the spiritualties cannot confirm leases; for such confirmation, being a mere voluntary act, and being to transfer a right to another, none are capable of it but those who have the estate and right in themselves, which such commendators in the *recipere*, substitutes, rectors, deputies, and guardians of the spiritualties have not.

Noy, 94; Palm. 460, 480; Latch, 237, 250; Jon. 158, &c.

Where there is a mere commendatory dean in the *recipere; quære*, whether the bishop's leases and grants are not to be confirmed by the clergy of the diocese, in case where there is no dean and chapter, or by whom else?

All leases or grants, which need confirmation of a dean and chapter, are to be confirmed by the dean and major part of the corporation, and being so confirmed are good, though several of the particular members dissent, or are not present; for the dean and major part of the chapter make the corporation, and the others have no negative voice to hinder such majority from doing any corporate act; for otherwise, by the corruption or perverseness of one or two members, the whole corporation might suffer; and that this was the law, appears by the following act of parliament:

Comp. Incumb. c. 44.

"Albeit that by the common laws of this realm of England, all assents, elections, grants, and leases, had, made, and granted, by the dean, warden, provost, master, president, or other governor of any cathedral church, hospital, college, or other corporation, by whatsoever name they be incorporate or founded, with the assent and consent of the more or greater part of their chapiter, fellows, or brethren of such corporation, having voices of assent thereunto, be as good and effectual in the law, to the grantees or lessees of the same, as if the residue or the whole number of such chapiter, fellows, and brethren of such corporation, having voices of assent, had thereunto consented and agreed; yet the said common laws notwithstanding, divers founders of such deanries, hospitals, colleges, and corporations within the said realm, have, upon the foundation and establishment of the same deanries, hospitals, colleges, and other corporations, established and made, amongst other their peculiar acts, local statutes, and ordinances, that if any one of such corporation, having power or authority to assent or disassent, should and would deny any such grant or grants, that then no such lease, election, or grant, should be had, granted, or leased; and for the performance of the same, every person having power of assent to the same have been, and be daily thereunto sworn; and so the residue may not proceed to the perfection of such elections, grants, and leases, according to the course of the common laws of this realm, unless they should incur the danger of perjury; for the avoiding whereof, and for the due execution of the common law universally within this realm, and every place, in one conformity of reason to be used, be it ordained, established, and enacted, by the authority of this present parliament, That all and every peculiar act, order, rule, and esstatute, heretofore made, or hereafter to be made, by any founder or founders of any hospital, college, deanry, or other corporation, at or upon the foundation of any such hospital, college, deanry, or corporation, whereby the grant, lease,

gift, or election, of the governor or ruler of such hospital, college, deanry, or other corporation, as have or shall have voice of assent to the same, at the time of such grant, lease, gift, or election, hereafter to be made, should be in anywise hindred, or let, by any one or mor, being the lesser number of such corporation, contrary to the form, order, and course of the common law of this realm of England, shall be from henceforth clearly frustrate, void, and of none effect;" with an abrogation of all oaths heretofore taken to such effect, and a penalty of 5*l.* on any person who shall for the future give such oath.

33 H. 8, c. 27.

When the dean and chapter are to confirm any lease, there ought not only to be a majority of them, but they ought also to be personally present, and *capitularitèr congregati* in one place; which, with other circumstances relating to the manner of their confirmation, will appear by the following case, which was thus:

The bishop of Fernes makes a lease for years; the chapter, consisting of eleven persons, viz. the dean and ten prebendaries, confirm it in this manner, viz. the dean makes one J S, a mere layman, his proctor or substitute, to give his assent to all leases or grants; this proctor, and three of the prebendaries only meet together, and fix the chapter seal to the confirmation of this lease, which confirmation was made in the name of the dean and chapter; after that, three others of the prebendaries, at several days, by themselves, subscribe their names to the said confirmation; and after the death of the bishop, his successor enters upon the lessee: it was adjudged lawful; for that the lease was void after the death of the bishop who made it, for want of confirmation; 1. Because no confirmation was made by the dean himself, but only by the proctor, which was not sufficient; for he was merely a stranger to the chapter, and not capable of such procuration; and therefore all he did was void both by the canon and common law; for in the canon law the rule is, *absens non potest demandare votum suum, nisi uni de capitulo;* and there is another rule, *oportet quod procurator semper institutus sit de collegio;* and another, *votum dari non potest per literas:* and agreeably to this is the rule of the common law; for in the parliament the peers may give their vote by procurator or proxy, but their proctors must be barons, and members of the same house; and a stranger is not capable of being a proxy; and admitting he were, yet where a corporation passes any interest, the members thereof cannot give their assent by proctors or substitutes; and so the doubt in Dyer seems to be resolved.

Dav. 42, 43, &c., Dean and chapter of Fernes's case; Dyer, 145; Roll. Abr. 479; Dyer, 145.

2. It was adjudged, that though the deed of a corporation needs no delivery, as the deed of a natural person does, but that the fixing of the corporation seal gives perfection to it, yet the major part of the corporation ought to be present when the seal is so affixed; for the major part of the chapter make the corporation, and their act is the act of the corporation, though the others do not agree; but here was only the proctor of the dean and three of the chapter present when the seal was affixed, which is not sufficient; for there ought then to be a majority present, otherwise it may be said to be *cum assensu*, but not *consensu*, and it ought to be *cum assensu et consensu* of the dean and chapter: for as a body natural cannot do any perfect act, if it be dismembered, the head in one place, and the hands in another; so neither can a body politic: and therefore they ought to be

capitularitèr congregati in a certain place. But it was agreed, that they are not confined to meet in their chapter-house, but may meet at any other place: but at such meeting and sealing there ought to be a majority then present; for if they set their names at several times, and in several places, after, this makes it not to be the act of the corporation, but *factum singulorum* in their singular and private capacity, and so shall not bind. It was also held, that the major part of the members being assembled, ought to give their voices and consents singly and distinctly, as in the choice of knights of the shire, and not in a confused and uncertain manner; and when the major part so consent, their consent ought to be expressed by their fixing of the seal to the deed of confirmation or other grant.

Dav. 47, 48, &c.; 2 Roll. Abr. 23, Show. P. C. 29.

The corporation of the mayor, bailiffs, and burgesses of Windsor made a lease for years, one bailiff only assenting; and this was held a void lease, if there were two bailiffs; but as to the burgesses, it was held, that if the greater part of them assented, this would be sufficient, though they were not present at the sealing, if their assent was had before. But *quære;* for the foregoing case seems to be an authority that there must be a majority present at the time of the sealing; for that is the act which expresses their consent; and unless there be a majority then present, no assent at any other time can make that good, which, for want of a majority, was void when it was done. But in that case it appears, that the consent of the majority was not had till after the sealing; whereas in this case the consent of the majority was before the sealing, though such majority was not present at the sealing; and therefore *quære*, if this makes any difference?

Dyer, 282 b, in margin.

But here a material difference is to be observed between a real interest and a bare authority or power only, as to the manner of concurring in such leases. For if a dean be seised of lands in right of himself and his chapter; or master or warden of an hospital or college in right of himself and the brothers and sisters or fellows of the same college; or a mayor in right of himself and the commonalty; and the dean, master, warden, or mayor, make a lease by indenture between the dean and chapter, master or warden, and the brothers and sisters or fellows of the same hospital or college; or between the mayor and commonalty of the one part, and J S of the other, whereby the dean with the assent and consent of the chapter, or the master with the assent of the brothers and sisters, or the warden with the assent of the fellows and scholars, or the mayor with the assent of the commonalty, lease such lands to J S, and with such assent or consent put thereto their common seal; this is a void lease; for the chapter, brothers and sisters, fellows and scholars, or commonalty, are equally seised, and have an equal right and interest in the lands with the dean, master, warden, or mayor, and therefore ought to join in the leasing or granting part of the deed, and not only to give their assent, for they all make but one person in law; and a body cannot be distinct, so as that one part may assent to the acts of the other. But, if the dean were sole seised of the lands in right of his deanery; the master or warden in right of their master or wardenship; or the mayor in right of his mayoralty; then the lease of the dean, master, warden, or mayor alone, with the assent and consent of the other persons before mentioned, is sufficient; because the dean, master, warden, or mayor only are seised and have a real interest, and the other persons before mentioned have no interest at all, but only a bare right or power of assenting to the leases

(G) Consent of others to Leases by Ecclesiastical Persons.

or grants of their respective heads, and therefore their assent or consent is sufficient, without joining in the leasing or granting part. So, if an abbot or prior be seised of lands in right of the abbey or priory, yet because the monks are all dead persons in law, and not capable of having any lands, of being impleaded, and such like acts; therefore, though they, together with the abbot or prior, constitute and make up but one body, yet the abbot or prior only has the power of leasing, and the assent or consent of the convent must be had and expressed by affixing their common seal, in the same manner as where the chapter, having no interest in their own right, are to assent to the leases of their dean. So likewise, where a parson makes a lease for years, he only is to grant or lease the lands, and the patron and ordinary are only to give their consent by affixing their respective seals, and expressing their consent or assent in the body of the deed; for the parson is the principal grantor, and the others have not any real interest in the lands, though the law has thought fit to require their assent to all leases or estates to be made by the parson.

Dyer, 40, Chafin's case; Plowd. 199; Roll. Abr. 478; 8 H. 7, 7, 8; 2 Leon. 176; 4 Leon. 11, Clerk's case; Bro. tit. *Confirmation*, 30, tit. *Faits* (45); Co. Lit. 300, 346; Godb. 210, Ireland v. Barker.

A dean, seised of lands in right of himself and his chapter, made a lease for years; the chapter confirmed this lease by a distinct deed; and it was held not good, because their deeds being severed cannot operate at all, since they are but one entire body and therefore cannot sever in their acts. But, if after such lease they had all joined in a confirmation, this had amounted to a new lease, and been good as the joint act of them all, as the original lease itself would have been, if all had joined in the leasing part.

Dyer, 40 b, in margin.

A lease for years was made in this manner; *præpositus, socii et scholares Collegii Reginalis in Oxonio*, guardianus *hospitalis*, *&c.*, and exception taken, that it ought to have been *guardiani*, in the plural number, for the college consists of many persons, and each of them is capable, and therefore not like an abbot or convent: but, *per curiam*, it was held good, for the college is but one body, and as one person, and therefore *guardianus* is sufficient to describe it by.

1 Leon. 134; 4 Leon. 85, Provost of Queen's College, Oxon.

As a patron may confirm explicitly by his deed or writing, so may he also confirm by consequence of law: for if a parson makes a lease for years to the patron, who grants or assigns it over to another, this amounts to a confirmation in law by the patron, because confirmation being nothing but an assent under the hand and seal of the party confirming, such assent in this case sufficiently appears by his assigning over the lease to another. But without such assignment, the ordinary's confirmation will not make good the lease to the patron to bind the successor, because in the acceptance of the lease the patron was only passive, and executed nothing under his hand and seal which could amount to a confirmation, as in the other case, where he makes an actual assignment over. But in case of such confirmation in law, the patron ought to be absolutely seised of the advowson; otherwise it will bind only according to the estate he hath therein, as will appear hereafter. But *quære*, if the assignment in this case were without writing, if that would be good, or could amount to a confirmation?

5 Co. 15, Newcomen's case; Cro. Car. 38; Roll. Rep. 361; Co. Lit. 301; Roll Abr. 481.

(G) Consent of others to Leases by Ecclesiastical Persons.

Another difference observable in the manner of confirming such leases as we are treating of is, as to their duration or continuance. For if a parson makes a lease for twenty-one years at this day, and the patron and ordinary confirm his estate therein for seven years, or, reciting the lease, confirm *dimissionem prædictam, et etiam indenturam eidem scripto confirmationis annexam, et omnia in eadem contenta, quoad septem annos solummodo, et non ultra*, yet is the estate or lease well confirmed for the twenty-one years: for when they confirm the estate of the lessee, that is entire, and cannot be divided. So, where a prebendary made a lease of a rectory, parcel of his prebend, for seventy years, before the statutes, and the bishop, reciting the demise, confirmed the *said demise or lease* for fifty years, and no more, and the dean and chapter likewise confirmed the same in the same manner, it was held by all the justices, that they might confirm severally, and that their confirmation was extendible to the whole seventy years; for when they confirm *dimissionem prædictam*, they confirm that demise or lease, which comprehends and includes the whole term of seventy years, and then the words *pro termino* fifty only, *et non ultra*, come too late, and are repugnant to the confirmation of *dimissionem prædictam*, which included the whole term of seventy years. But it was agreed, that if after such recital of the demise they had confirmed the *land* to the lessee for fifty years only, this had been a good confirmation for fifty years only, and no such repugnancy in the confirmation: and so, if the demise had been of thirty acres, they might have confirmed the lease as to one or more acres, or might have confirmed all, or part, on condition. And a diversity was taken between a bare assent without any right or interest, and an assent coupled with a right or interest; for the termor, who is to perfect an act by his attornment, cannot assent for a time, nor upon condition, nor for part of the thing granted, but it shall enure absolutely to all, because he having but a bare right cannot qualify or apportion it; but the bishop, who is patron, and the dean and chapter, have an interest in the parsonage or prebend, and every part of it; for the patron hath *jus conferendi;* and a release to the patron of an annuity in the time of vacation is good, and the patron and ordinary may charge the glebe in the time of vacation, and therefore having an assent clothed with an interest may qualify it as they please. Another difference was taken in the cases before mentioned between a lease for years and an estate of freehold or inheritance. For if a parson or prebendary make a lease for years, confirmation may be made of the *land*, as has been said, for a less number of *years*, or of the *lease* for a less number of *acres;* for the years or acres are several, although the lease or term, or land are one; so that if a lease be made for five years, rendering 20*l. per annum* rent, the years are several, so that an action of debt will lie for the rent every year. But if a parson or prebendary before the statutes had made a lease for life, a gift in tail, or a feoffment in fee, and confirmation had been made of the *land* to the lessee, donee, or feoffee for an hour, this would be good for ever; for the freehold or inheritance passing by one and the same livery is entire, and then the confirmation, which is an act of less notoriety, cannot break or divide it; for such confirmation being an assent to an act which passed the whole, must extend to the whole which passed by the act.

Dyer, 52, 338; Cro. Eliz. 447, 472; 5 Co. 81; Co. Lit. 297; Moore, 479, 481; Co. Lit. 300; Bendl. 238, and 47; Hetley, 75; Cro. Eliz. 79; 21 H. 7, 41; F. N. B. 49; Co. Lit. 343 b.

(G) Consent of others to Leases by Ecclesiastical Persons.

3. *What Estates they who make such Confirmation are to have.*

As to the estate they who make such confirmation ought to have, to make the lease effectually binding upon the successors, this regards chiefly the patron, whose advowson or right of patronage, being a temporal inheritance, and considered as such, is to be governed by the same rules as other temporal inheritances are; and therefore his confirmation, being in nature of a charge upon the advowson, is to be directed by the estate which he hath in the advowson, and can continue no longer than that endures.

Comp. Incumb. c. 44.

Therefore, if the patron be but tenant in tail, or tenant for life, his confirmation shall bind only such incumbents as come into the church during his own life: and accordingly it was agreed by Coke and Dodderidge, that if a parson makes a lease for years, which is confirmed by the patron and ordinary, the patron being tenant in tail, and the patron and parson both die, and the issue in tail doth present another, his presentee shall hold the rectory discharged of such lease. And also they agreed, that although the issue in tail, after a presentation, levies a fine, yet the presentee of the conusee, when the church becomes void again, shall hold it discharged; because the confirmation was defeated by the presentation of the issue in tail before the fine levied. But, if the patron, tenant in tail, discontinues the estate-tail, the lease confirmed by him shall stand good during the continuance: or if the estate-tail be barred, it shall stand good for the whole term: for now the estate of the patron, in respect whereof the estate was only voidable by the presentee of the issue in tail, is become an absolute and unavoidable fee.

Co. Lit. 300; Roll. Abr. 480; Roll. Rep. 361; Bridg. 95; Leon. 234.

So, if the patron had a conditional estate in the advowson, and he confirms a lease of the parson's, and after the condition is broken, this defeats also his confirmation, so that the succeeding incumbent shall not be bound by it; for his confirmation, which was in virtue of, and derived out of his estate in the advowson, could not be more lasting than that estate itself was.

Co. Lit. 300 b.

If the chaplain of a chantry or free chapel that was a donative, had made a lease for years before the dissolution of chantries, and the patron of the chapel being seised of the patronage in tail, had confirmed it, this should not have bound the chaplain of the issue in tail; because the tenant in tail could not, by any act of his, bind the issue in tail after his death: and in such case, if the patronage of the donative came to the king, by the statute of chantries, neither the king, nor his clerk, should be bound by the said lease. But, if the donor had levied a fine after the confirmation, by which the issue in tail was barred from avoiding the lease, the king also should be barred: and as the issue in the other case would not have been barred, no more would the king, who comes in subject to all the advantages or disadvantages the issue in tail was capable of, or liable to.

Dyer, 252; Roll. Abr. 480.

If tenant in tail of an advowson, and the son and heir apparent, join in a grant of the next avoidance, and after the tenant in tail dies, the son shall avoid the grant, because he had nothing in the advowson at the time of the grant made.

Roll. Abr. 482; Hob. 45; Brownl. 165.

If a parson make a lease for years, and there be three coparceners or

tenants in common, who are patrons, all ought to join in the confirmation, else it will not bind the next incumbent, because they are all but one patron; *per* Coke. But, if there be a composition to present by turns, *quære*, if a lease confirmed by him, that hath the next turn when the church voids, shall not be good to bind his presentee? But in the first case [viz. the case in Dyer] it is held, that if one of the patrons, and the ordinary, confirm the lease, and the parson dies, and then the ordinary collates by lapse, this confirmation by the one patron is good, and that the collatee shall not avoid it; and this is said there to be adjudged upon long and good argument, and the case cited for it is Lancaster and Lucas; which does not appear to be adjudged in Leonard, but is there said to be adjourned. *Ergo quære causam;* for the ordinary hath no interest, but presents in right of the patron, and therefore his clerk shall be so far bound, and no farther, than the clerk of him who suffered the lapse should have been. But Popham argued, that this title of lapse was an interest in the ordinary, and not an authority only, and then all who come in under that interest shall be bound by the ordinary's confirmation of the first lease. And he said, that at the beginning, the patron was not restrained to any time to present his clerk, but the six months were appointed, at the instance and suit of the ordinaries, by a canon confirmed in the council of Lateran; before which time the ordinaries had not any lapses; but after the said canon they had an interest, which the civilians call *interesse caducum et conditionale;* and it is such an interest, that if the bishop dieth before collation or presentment, so as the temporalities come to the king, the king shall present. *Quære* of this?

Dyer, 72 b, in margin; Leon. 234, Lancaster v. Lucas.

If the husband and wife, patrons of a church in right of the wife, confirm a lease made by the patron, yet this shall not bind the presentee of the wife, if she survives her husband, nor her heirs, nor their presentees, after her death; because the deed was void *quoad* the wife, being a feme covert, and the husband had nothing but in her right, which died with him.

Dyer, 133 a; Roll. Abr. 479.

Though he who confirms as patron hath a fee-simple of the advowson in him, yet if, before he confirms, he hath granted away the next avoidance, his confirmation of the presentee's lease will not be good to bind the presentee of the grantee of the next avoidance, unless such grantee doth also confirm; and if the presentee of him that hath the next turn doth enter and avoid such lease (as he well may) and then dies, and the patron of the fee presents a new incumbent, who is admitted, instituted, and inducted, this new incumbent shall hold the benefice discharged of the lease, as his predecessor should have done, though he came in by the presentation and admission of the patron and ordinary, who confirmed the lease. So, if the bishop were patron in right of his bishopric, and after such lease made by the parson, the bishop, dean and chapter had granted the next avoidance to another, and then after they had all confirmed the lease; yet upon the incumbent's death, if the grantee of the next avoidance presents, and the clerk is admitted, instituted, and inducted, and avoids the lease, it shall never take place against any subsequent incumbent, though he come in by the same patron who confirmed such lease. The reason of these cases is, because the grantee of the next avoidance, and his presentee, come in by title paramount the making or perfecting of such lease; and the presentee or parson, having the whole fee in him, when he had once defeated the lease,

it shall never after revive or take place against any subsequent incumbent. And though Littleton seems to be of opinion, that the parson hath not the right of the fee-simple in him, yet he explains himself to mean as to the bringing of a writ of right; for otherwise it is the act of the parson which charges or gives, and the patron and ordinary only assent, and then the lease being avoided by him who hath the fee-simple of that land which was so leased, it can never after be set up again, being totally defeated by his title paramount. Another reason may be, that having granted the next avoidance before such lease made or perfected, the grantee is now become the present patron, and ought to concur in all acts whereby the possession is to be charged: for as before such grant, the patron's confirmation, who had the whole fee in him, would have been sufficient; so now, having granted away part of that fee, the grantee ought to join likewise, so that the confirmation may be by all who have any interest in the parsonage, as well those who have the present and possessionary interest, as those who have the future and reversionary interest; since otherwise the confirmation is not complete, and the lease is then liable to avoidance for want thereof.

Moore, 67, 481; Dyer, 72 b, 133 a; Cro. Car. 582; Jon. 454; Roll. Abr. 480; Co. Lit. 46 a; 7 Co. 36; Hob. 7.

If a church be full of a parson, and after another be made parson and inducted, and he make a lease for years, which is confirmed by the patron and ordinary, yet the lease is void; because he who made it was not parson, the church being full before.

Roll. Abr. 477; 9 H. 6, 34.

So, if a church be void, and one enter and occupy of his own wrong, without any presentation or institution, and occupy as parson, and make a lease for years, which is confirmed by the patron and ordinary; yet this is void, because the lessor was no incumbent; for none can be parson or incumbent without presentation or collation. So, a lease by a parson, vicar, prebendary, &c., before induction or instalment, though confirmed, shall not bind the successor, because till then they have nothing in the temporal possessions.

Roll. Abr. 477; 9 H. 6, 34; 10 H. 6, 11; Degge, 120.

But, if a church be void, and one present by usurpation, and the incumbent of the usurper, after admission, institution, and induction, make a lease for years, which is confirmed by the usurper as patron, and by the ordinary, and after, in a *quare impedit*, the true patron recover, and remove the incumbent; yet it seems the lease shall stand, because there was a patron *de facto*, who made and confirmed such lease; and the parson, coming in by all the solemnities of law when the church was void, the people could take notice of no other, and therefore all acts done by him, and legally confirmed, are good. But Rolle cites this case, that the successor of the rightful patron, after recovery, shall avoid such lease, because it was not made or confirmed by a rightful parson or patron; *ideo quære?*

9 H. 6, 33, 34; Roll. Abr. 480.

King Ed. 6 being patron of a church full of an incumbent, by his letters patent grants the advowson to the bishop of Coventry and Litchfield and his successors, and grants that, after the avoidance of the church by death, resignation, or otherwise, the said bishop, and his successors, should hold the said church *in proprios usus*. The bishop after, by indenture, makes a lease for forty years, to begin at such a time as the said parsonage should

come to the hands of him, or his successors, by death, resignation, or otherwise; and this is confirmed by the dean and chapter; the bishop dies; then the incumbent dies; and the successor of the bishop enters, and makes a lease for twenty-one years, &c. And by the justices it was held, that the first lease was absolutely void; for the lessor had nothing in the parsonage impropriate during the life of the incumbent, and he survived the lessor, and therefore it could never take effect: and it could not be good by estoppel; because the truth of the case appeared in the indenture of lease itself, that he had nothing during the incumbent's life. This case further proves, that the whole fee is in the present incumbent; and, as in the cases before mentioned, the avoidance of a lease by the present incumbent shall be an avoidance of it for ever; so in this case, for want of the present incumbent's joining, the lease shall never arise.

Dyer, 244; Plowd. 400; Co. Lit. 352; Co. 155 a; 10 Co. 48 a.

4. *At what Time such Confirmation is to be made.*

As to the time of confirmation, generally speaking, it is not material, whether it be before or after the making of the lease, which is to be so confirmed, so it be made in the lifetime of the parties who make the lease; for the confirmation is but an assent or agreement by deed to the making such lease or grant, and not a confirmation of the estate itself, as will appear more fully by the following cases and diversities.

Co. Lit. 300 b.

If a disseisor makes a charter of feoffment to A with a letter of attorney to deliver seisin, and, before seisin given, the disseisee confirms the estate of A, or the deed made to A, this is clearly void, though livery be made after; for this must enure as a confirmation of the estate, which cannot be good before the estate passed, as before livery it did not. But, if a bishop had made a charter of feoffment before the statutes with a letter of attorney, and the dean and chapter, before livery, confirm the deed, this is a good confirmation, and livery made after is sufficient. So, if the bishop had granted a reversion, the dean and chapter might confirm the deed or grant before attornment.

Co. Lit. 301 a; 3 Leon. 17; 4 Leon. 223, Bishop of Rochester's case.

So, if a bishop at the common law had granted lands by deed to the king, and, before enrolment, the dean and chapter, by their deed, confirm the deed of the bishop, and after the deed of the bishop is enrolled, this is a good grant and confirmation; because, as to the bishop, it was a perfect deed, and therefore capable of being confirmed; though to enable the king to take, there wanted enrolment, which might be at any time after. The same law, if the bishop had made a lease for years to the king, confirmation of the lease before enrolment would be good.

Co. Lit. 301 a; Roll. Abr. 478; Palm. 466; Latch. 240, Dimmock's case.

So, if the patron and ordinary had by deed given license to the parson to grant a rent-charge out of the glebe, and the parson had granted it accordingly, this was good, and should bind the successor, though it was not a confirmation subsequent, but a license precedent.

Co. Lit. 300 b; Roll. Abr. 480; 7 H. 4; 15 Bro. Nov. Cases, 201.

So, if a bishop makes a lease for years at this day, which needs confirmation; and the lease is made on the second of May, and confirmed on the

first of May, this is a good lease, by Catlin and Southcot; but Wray objected, that a lease cannot be confirmed before it be made; to which they replied, that the assent before was a good confirmation of the lease made after.

Owen, 33.

So, where a bishop made a lease the second of May, which was confirmed the third of May, and sealed the fourth of May; this was held a good confirmation.

So, where the deed of confirmation bore date before the deed confirmed, but by agreement the deed confirmed was first delivered, the confirmation was held good; for a confirmation is but a mere assent by deed to the grant, and therefore may be either before or after the grant or lease itself, or at the time of the lease or grant; as, if a parson makes a lease, with the assent of the patron and ordinary, this is a good confirmation; and so where the dean and chapter are to confirm likewise, if their respective seals are affixed.

1 H. 6; 8 Roll. Abr. 480; Dyer, 106.

And yet it hath been holden on the contrary, that if a confirmation be made and delivered before the grant or lease to be confirmed, that this is not a good confirmation; and though, after the grant or lease, the deed of confirmation be delivered again, yet that will not make it good, for that it was a deed by the first delivery; and the second delivery will not make it good as an assent, because the assent ought to be by deed, and the first delivery was void. But that confirmation may be made before the grant or lease be confirmed, the other cases are express, and the reason of the thing seems likewise to make for it; for the confirmation being nothing but an assent or agreement that the bishop or parson may make such lease, &c., when this assent appears under seal, and a lease, &c., made pursuant to it, there can be no reason to impeach the lease after, which has all the sanction that the law requires, viz., the concurrence and assent of the persons appointed by law to that purpose, and before or after are only circumstances of time, which seem not material when the assent, which is the substance, sufficiently appears.

Roll. Abr. 480; 8 H. 6, 6.

Therefore, if a bishop makes a lease for twenty-one years according to the statutes, and after makes a concurrent lease for years of the same land to another, and after, before any confirmation of the second lease, the bishop makes another concurrent lease to a third person, which is immediately confirmed, and after the second lease is confirmed also; in this case the second lease shall be good and effectual by the confirmation, although the last lease was confirmed before it, because the confirmation adds nothing to it, nor conveys any interest, but only makes it more perdurable and effectual.

Moore, 66, pl. 180.

And upon this reason it hath been adjudged, that leases made before 13 Eliz. c. 10, for more years than are allowed thereby, being confirmed after the said statute, are good, and shall bind the successor; for the confirmation is only an assent, and when it is made relates to the making of the lease, which, being before the statute, remains at common law, and, by consequence, binds the successor: also, such confirmations being only to perfect leases made before that statute, are not within the intent thereof.

5 Co. 15, Newcomen's case; Cro. Eliz. 18, Higgins v. Grant; Cro. Car. 38; Cro. a. 53.

(G) Consent of others to Leases by Ecclesiastical Persons.

So, where an archdeacon, impropriator of a parsonage, 12 Eliz., let part of his glebe for fifty years, and the bishop, patron of the archdeaconry, and the dean and chapter, 15 Eliz., confirmed the lease, and then the archdeacon died; it was held, 1. That the statute 1 Eliz. c. 19, extended only to the immediate possessions of the bishopric, and here the land let was not any part of the possessions of the bishopric, but of the archdeaconry; and the confirmation, though it is necessary, yet at most it amounts only to an assent, and the interest passes from the archdeacon, and not from the bishop. But, if the bishop had been disseised of any of the possessions of the bishopric, and after had confirmed the land to the disseisor, this would not bind his successors, because here the confirmation passed an interest, and without such confirmation the bishop himself might have entered and restored the possession, and no act of his singly can bind his successor. 2. It was adjudged that this confirmation, though after 13 Eliz. c. 10, should bind the archdeacon's successor, because the lease to which it relates was made before the statute, and that statute (*a*) restrains only from alienating, not from confirming.

Cro. Eliz. 430; Moore, pl. 636, Sir Edward Denny v. Eakinstal. (*a*) ‖ This reason, which seems but a weak one, is not to be found in either of the reports cited.‖

But, if a bishop, parson, or any other sole ecclesiastical corporation, makes a lease for years, which needs confirmation, this confirmation ought to be made in the life and during the incumbency of the lessor; for after his death, resignation, deprivation, or other amotion, the lease is become void for want of confirmation; and then confirmation made after cannot revive it, though it be made in the vacation before any successor comes in.

Co. Lit. 301; 21 H. 7; 1 Degge, 118; 4 Leon. 78; in which last book the contrary is held by Clench.

But, if a parson makes a lease for years, which is not confirmed by the bishop or patron then in being, but by the succeeding bishop and succeeding patron, this is a good lease, and shall bind the successor, because the lease was absolutely good against the parson himself who made it, and the confirmation was only necessary to make it binding on the successor; and in this case, the lease being duly confirmed during the incumbency, had all the sanction the law requires; for there is no prefixed time for the confirmation of such leases, so it be made during the life and incumbency of the lessor.

5 Co. 15; Cro. Car. 38.

5. *How far a Regard is to be had to the true naming of the Corporation or Persons who confirm.*

Herein we shall only observe, that corporations aggregate, as dean and chapter, mayor and commonalty, warden and fellows, &c., may make or confirm leases, without expressing either the Christian or surname of the dean, mayor, warden, &c., because in their politic capacity, as a corporation aggregate, they continue always the same, and are said never to die: but in leases or confirmations by a bishop, dean, mayor, &c., or other sole corporation, both their Christian and surname, or at least their Christian name, ought to be expressed, because they are subject to death and succession, &c., and therefore must be particularly named to show whose lease, &c., it was; and so some hold too in the first case.

Bro. tit. *Leases*, 45; Dyer, 83, 86, 106; 11 Co. 21; Hob. 32; Leon. 307. But for this vide head of *Corporations*.

(H) Of void or voidable Leases by Ecclesiastical Persons: And herein,

1. *Against whom Leases not pursuant to the Statutes, or otherwise defective, are void or only voidable.*

HERE it is to be observed, that if a bishop grants the next avoidance of a church, which is not warranted by 1 Eliz. c. 19, because it is a thing which lies merely in grant, out of which no rent can be reserved; or makes a lease of the advowson of a church; or grants an annuity out of the possessions of his bishopric; or makes a lease of tithes for three lives, or a lease of any other of his possessions, not pursuant to all or any of the eight rules before mentioned; yet in none of these cases is such lease or grant void or voidable by the bishop himself who made it, but remains good against him during such time as he continues bishop. But as to the successors of the bishop, such leases or grants are void or voidable, as the case happens to be, as will appear hereafter. And the reason such leases or grants are good against the bishop himself, who made them, is, because they were so at the common law, and the statutes were made only for the benefit of the successors, that they should not be bound by those acts of their predecessors, which might turn to their prejudice and disadvantage; but not to give the bishop himself power to avoid or derogate from his own acts, which would be against all rules both of law and equity, and therefore was not within the meaning of the said statutes; for then he would be empowered by act of parliament to do wrong to other persons, which it cannot be presumed the parliament intended to allow.

Comp. Incumb. c. 45; Cro. Eliz. 440, and 241; Sav. 119; 3 Co. 59; Cro. Ja. 173; 2 Brownl. 164; Cro. Eliz. 207, 690; Hard. 326; Co. Lit. 45 a; 10 Co. 59 b; 2 Leon. 138; Leon. 308; Roll. Rep. 169; Keb. 182; 11 Co. 73 a.

So, where a bishop, by deed enrolled, gave lands to the queen, without the consent of the dean and chapter, yet it was held, that this was good against the bishop himself who made such gift.

Roll. Rep. 151.

So, for the reasons before mentioned, though the 13 Eliz. c. 10, says, that all leases, gifts, grants, &c., made by any persons or corporations therein mentioned, contrary to the tenor of that act, shall be utterly void and of none effect to all intents, constructions, and purposes; yet it hath been adjudged, that a lease made by a dean and chapter against the said statute shall not be avoided, nor any covenants therein contained, during the life and continuance of the dean that made the lease; so that if they have made a lease for years of any of their possessions, and before the expiration thereof made a concurrent lease also of the same lands, and then make a third lease for lives, with express covenant, that the grantee for lives shall enjoy the land against the second or concurrent lease; and grantee for lives being in possession is evicted, and brings covenant against the dean and chapter; in this case, though the lease for lives be void by the 13 Eliz. c. 10, yet it was agreed by the justices, that because the dean who made the lease for three lives was living, and continued dean at the time of the eviction, the lease was not void, and by consequence, an action was well maintainable against the dean for breach of the covanant therein contained.

Brownl. 21; Moore, 875; 2 Brownl. 134, 158; 3 Co. 60; Leon. 308; Co. Lit. 45 a.

So, where a master and fellows of a college, by deed enrolled, made a lease for years, not warranted by that statute, and afterwards suffered a fine, and five years to pass without claim; though this was void against the succeeding master, yet by construction the lease and fine were held good against

the college, (though it be a corporation aggregate that never dies,) during the life of the master, who was party to the lease, and made no claim; because he was the head and principal part of the corporation.

11 Co. 67, 78 b; Roll. Rep. 171.

So, if a dean, archdeacon, prebendary, parson, or other sole corporation, make leases of their sole possessions, not warranted by the said statutes, yet they shall bind themselves during their whole time, because the statutes were made to provide chiefly for the benefit of the successors, and not to relieve the parties themselves against their own acts or grants; though it was held by Popham, that if a parson made a lease without reserving any rent, that this should not bind even himself; but *quære?*

Hetley, 24; Co. Lit. 45 a; Comp. Incumb. c. 45.

But, where there is a chapter that hath no dean, as the chapter of the collegiate church of Southwell, there, grants or leases made by them contrary to 13 Eliz. c. 10, are void *ab initio* against themselves: and so, of leases or grants by any other corporation aggregate, who have no head or principal person. For they must be either void *ab initio*, or good for ever, because they continue always the same, and one has no superiority or power more than another. But in case of a dean and chapter, master and fellows, &c., though they are a corporation aggregate, and never die, yet leases or grants made by them, contrary to the said statutes, shall bind during the time of the dean, master, &c., who was party thereto, because such dean, master, &c., who are the head of the corporation, are subject to death and succession as other sole corporations, and therefore shall have no aid from the statute to avoid their own leases; but only their successors, for whose benefit the statute was made, together with the chapter. But, if the dean and chapter, master and fellows, &c., were all equally seised, and the dean and master solely should make a lease, though it were in all respects warranted by the statutes, yet this lease seems void *ab initio* at common law, because the dean, master, &c., had no sole seisin whereof to make any lease at all; but the chapter in the one case, and fellows in the other, having an equal estate and interest, ought to have joined in such lease or grant, and for want of their joining, such lease or grant seems void at common law, as it would be for a misnomer, &c., and then the lessee cannot hold it against the dean and chapter, if they seek to avoid it.

Mod. 204; 2 Mod. 56; Hard. 326; Leon. 308; 3 Co. 60; Co. Lit. 45 a, 325 b, 341.

As leases and grants, not warranted by the statutes, are not void against the lessors and grantors themselves, so neither are leases or grants made without due confirmation, where confirmation is necessary, but only by the grantor's death or amotion.

Dyer, 239.

If a bishop makes a defective or voidable lease or grant, not only the successor, but also the king, when the temporalities come into his hands, may take advantage thereof, by avoiding it during the vacancy of the bishopric, in privity and right of the bishop. But this shall not so absolutely avoid the lease, but that the succeeding bishop may make the same either good or void, at his election, as to himself; and this either expressly, as by actual agreement to the lease or grant of his predecessor; or implicitly, as by acceptance of rent incurred after the death of his predecessor; or doing any other acts, which amount to an agreement in law. And therefore this dif-

fers from the cases before put, where avoidance of a lease by a parson shall avoid it, not only for his own time, but also against all his successors; so that they can never after set it up again, or affirm it by any act of theirs whatsoever: for the parson hath the whole fee-simple in him as much as any of his successors can ever have; and therefore when he once avoids the lease, as to the whole fee-simple which he hath, he avoids it for ever, so that it can never after revive; but the king hath not the fee-simple in the temporalities, but only the custody or guardianship of them during the vacation of the bishopric, which is but a temporary and qualified interest; and therefore what he does shall not be binding on the successor. But, if the successor himself avoids such lease or grant, then it is the same with the other case, and no succeeding bishop after can revive or set it up again, because it was avoided by one who had the whole fee-simple and estate in him.

7 Co. 7, The Earl of Bedford's case.

But here a difference is to be observed betwixt such leases as are actually void by the death, &c. of the lessor, and such as are only voidable. And here again we must distinguish; 1. Between the person leasing. 2. Between the things leased, and the leases themselves. And because the common law, with respect to these distinctions, holds good still, where the several statutes before mentioned are not pursued, we shall consider how the common law stood in these particulars, which, together with the reasons thereof will show how the law is at this day upon the statutes.

The first distinction to be observed is between the persons leasing; that is, between such sole corporations as had the whole fee-simple absolutely in them, as bishops, abbots, &c., and such sole corporations as were looked upon only to have a qualified fee-simple, as parsons, vicars, prebendaries, provosts in cathedral churches, and others who were presentative or collative, and not elective.

As to leases by parsons, vicars, &c., if by the common law any of these had made a lease for years of any of the possessions of their church, without confirmation of patron and ordinary, &c., such leases by their death, or other avoidance, had become absolutely void without entry or other ceremony so as no acceptance of the rent, or other act done by the successor, could affirm or make them good or binding over against themselves. But leases for years by bishops, abbots, &c., though without confirmation of the dean and chapter, or assent of the convent, were not absolutely determined by their death, &c., but continued good till some act done by the successor to avoid them: for they have, and always were allowed to have, the whole fee-simple and inheritance of their possessions in themselves; and therefore, before the third council of Nice, *anno* 710, might by their sole alienation, without the confirmation of the dean and chapter, have bound their successor for ever: and though by that council such alienations are restrained, as hurtful and injurious to the church, and the confirmation of the dean and chapter made necessary; yet this is only *quoad* binding the successor; for the fee-simple continues still in them; and therefore leases for years made by them subsist after their death or removal, as they would do, if they had been made by a tenant in fee of any lay possessions, till the successor comes to avoid them by aid of the canons made at that council, which have received a sanction from our law.

Bro. tit. *Acceptance*, 9, 10, 26, tit. *Confirmation*, 21, tit. *Dean*, 20, tit. *Leases*, 18, 19, 32, 33, 52; F. N. B. 50; Plowd. 264; Cro. Eliz. 18; Poph. 121; Dyer, 46, 231; Co.

(H) Of void or voidable Leases by Ecclesiastical Persons.

Lit. 45 b, 102, 341; 6 Co. 8 a; Hetl. 88; Roll. Abr. 481; Roll. Rep. 361; Bridgm. 94; 3 Co. 65; Raym. 166; 2 Keb. 325.

So, it was in case of abbots, priors, or deans, &c., where they were sole seised; if they had made a lease for years of any of their possessions, this had not absolutely determined by their death, &c., because they had the whole fee-simple in them; and therefore such leases continued good till the successor came to avoid them) for want of confirmation of the persons substituted by law for that purpose.

Vide the authorities *supra.*

Therefore, where a prebendary made a concurrent lease for years of tithes, rendering the ancient rent, without confirmation of the dean and chapter, it seems to be allowed, that this was not absolutely void by his death, &c., but only voidable; and then acceptance of the rent by the successor would make it good during his time: for leases not warranted by those statutes remain at common law, which makes them only voidable, not actually void upon the death, &c. of the person who makes them.

Hard. 156, Sir John Thoroughgood v. Sir Henry Herbert.

The second distinction to be observed is, between the things leased and the leases themselves.

It has been before observed, that leases for years by parsons and vicars determine absolutely by their death, without entry, or other ceremony; but, if they make a lease for life or lives, and die, or are removed, yet the lease continues good till some act done by the successor to avoid it. The reason is, because such lease for life or lives being an estate of freehold, could not pass without the solemnity of livery and seisin; and therefore to defeat that, there must be an act of equal notoriety, viz. the entry of the successor; and by consequence, if the successor before such entry accepts the rent, or does any other act signifying his consent to such lease, this affirms the same during his time, so as he can never after avoid it, because it was only voidable, not actually void by the lessor's death, &c., and, consequently, capable of an affirmance. And the law is the same at this day, as to things which lie in livery.

Vide the books *supra.*

But as to things which lie in grant or prender, there seems a diversity between the common law and the law as it stands at this day upon the before-mentioned statutes: for if a bishop makes a lease for lives of a portion of tithes, or other things not manurable, reserving the ancient rent, and dies, &c., and his successor accepts the rent, yet this acceptance shall not bind him, because the lease was absolutely void by the bishop's death, &c., who made it, without entry, or other ceremony. And the reason of its being so absolutely void is, because the things leased lying only in grant or prender, no rent could be thereout reserved, recoverable by the successor; for distrain he could not, because there was nothing wherein a distress might be taken; and an action of debt would not lie, (*a*) because the lease being for lives, no action of debt was maintainable till after the lives ended; and therefore since his acceptance of the rent due at one day will not enable him to sue for it, if afterwards denied, he shall not be bound by such acceptance. But, if the tithes, or other things lying in grant, had been let for years, there, the successor's acceptance of the rent would have bound him during his time, because, then, he might have an action of debt for any arrears

that should incur after. And this construction seems to arise wholly from the statutes before mentioned, which, as appears before, were made wholly to provide for the successor, that he might not be impoverished or prejudiced by the acts of his predecessor: for at common law all leases for lives or years, as well of things which lay in grant as of things which lay in livery, were only voidable after the bishop's death, &c., not actually void: and herein the law at this day, as to bishops, appears to be the reverse of the common law as to parsons, vicars, &c., for as their leases for years were absolutely void by their death, &c., but their leases for life or lives only voidable; so here the bishops' leases for lives are absolutely void by their death, &c., whereas their leases for years are only voidable by their successor. But *quære*, whether the common law made any such distinction as to things in livery and things in grant, either in case of bishops, or parsons, vicars, &c.? for the only distinction taken notice of in the books is, between bishops, &c., who had the whole fee absolutely in them, and parsons, vicars, &c., who had only a qualified fee; and between leases for years by parsons, vicars, &c., and leases for life or lives made by them. But it seems clear, that if the law be so at this day as to bishops when they make leases of things in grant, so it is as to all other ecclesiastical persons (except parsons, vicars, &c.,) within the statutes before mentioned, that leases for lives of things in grant determine absolutely by their death, for the reasons before given; but leases for years of such things in grant are only voidable by the successor, not absolutely void. But, as to parsons, vicars, &c., leases for years made by them, whether of things in livery or things in grant, determine absolutely by their death, if not duly confirmed, or the statutes not pursued, because then they remain at common law, where their death or other amotion was an absolute determination of all leases for years in general made by them, and, consequently, of leases for years of things in grant, as well as others. And this distinction in the principal case between leases for lives of things in grant, and leases for years thereof, by bishops and other ecclesiastical persons within the said statutes, (except parsons, vicars, &c.,) that in the one case, they are absolutely void by the death, &c. of the lessor, and in the other, only voidable, seems to be a reasonable distinction, and to reconcile all the books, which make it a great question, if leases in general by bishops, &c., not pursuant to the said statutes, are absolutely void by the death, &c., of the lessor, or only voidable. For if leases for years by them of things which lie in grant are only voidable, and not actually void, because the successor is not without some remedy for the rent, and therefore may adhere to that, if he pleases, and affirm the lease for his time; much less are leases for years or lives of things which lie in livery (though the statutes are not pursued) absolutely void by the death, &c., of the lessor, since in such cases the successor has as full and ample remedy for the rent by distress or otherwise, as he would have had if all the circumstances required by the statutes had been pursued; and then *quilibet potest renunciare juri pro se introducto;* and if the successor thinks fit to waive the defect of such circumstances, and abide by the lease, it would be unreasonable, and against the intent of the statutes, to put it out of his power so to do, by making the lease actually void, so as no acceptance of the rent, or other act done by him, could affirm it. But, where his acceptance of the rent at one day will not help him to any remedy for it the next, there, it

would be unreasonable that such an unwary act should strip him of the benefit intended for him by the said statute, and where he had no remedy for the rent, should have none for the land neither, and would totally frustrate the design and intent of the act, and tend to the impoverishment of most successors to ecclesiastical persons.

Cro. Ja. 173; Comp. Incumb. c. 45; Palm. 175; Degge, 134, 318; Bro. tit. *Leases*, 41. (*a*) [But by 5 Geo. 3, c. 17, Debt will now lie upon such leases for lives.] 2 Roll. Rep. 161, Ed. Coke's case; Jon. 406; Cro. Car. 95; 5 Co. 2; 10 Co. 60, 61; Cro. Ja. 173.

But this acceptance of rent, (*a*) which shall affirm a voidable lease, must be by him who is perfect successor; therefore, where the successor of a bishop, before he had a restitution of the temporalities out of the king, accepted the rent reserved by his predecessor upon a voidable lease, it was held, that notwithstanding this acceptance, he might well enter and avoid the lease; because before such restitution he was not perfect successor; and then such acceptance of the rent shall not bind him, any more than if he had been a perfect stranger.

Palm. 517, Bishop of Oxford's case. (*a*) [Acceptance of rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation of a lease. It cannot be a confirmation, unless done with a knowledge of the title at the time; or, unless the remainder-man lies by, and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant. *Per* Lord Mansfield, Cowp. 483.]

So, where a master of a college, or head of any corporation aggregate, accepts rent upon a voidable lease made by his predecessor, and the rest of the corporation, without authority in writing from the corporation to accept the same; this acceptance shall not affirm the lease during the life or continuance of such master or head who so accepted it; for the right being as much in the fellows, or other members of the college, as in the master, &c., himself, he cannot by any act of his own conclude or bind them from their entry upon any voidable lease. Besides, he himself, in their right, may enter to avoid such lease, notwithstanding his own acceptance of the rent.

11 Co. 79 a; Roll. Rep. 172, Magdalen College's case.

If a bishop's bailiff, of his own head, and without any order from the bishop, receives rent upon a voidable lease made by the predecessor of the bishop, this shall not bind the bishop. But, where a bishop made a lease for lives of certain lands, parcel of the manor of A, reserving rent, but not in all things pursuant to the statutes, and, by consequence, voidable by the successor; and then the bishop died, and another was made, and the bailiff of the manor came to him, and showed him, in general, that there were certain rents in arrear of the said manor, and thereupon the bishop commanded him to receive the said rents, which he did accordingly; and, amongst the rest, the rent upon the said voidable lease; and after paid all the said rents to the bishop, without giving him notice particularly of that rent; this acceptance shall bind the bishop, because he ought to take notice what leases are made by his predecessor, and what rent he himself received; for, if he had no title, he ought not to have received the rent at all; if he had, he must be supposed to know it; and then his acceptance of the rent shows his assent to the lease upon which it was reserved.

Roll. Abr. 474; Hetley, 24; Cro. Car. 95, Wheeler v. Danby.

Also, it is to be observed, that so far as the lessor is bound by any void or voidable leases, so far also the lessee, his executors or assigns, whichsoever of them have the interest, are bound thereby, and no further: there-

fore, when the lease is not void without entry, if rent be in arrear after the death of the predecessor, the successor hath remedy to recover such arrears, if he chooses to affirm the lease; but, if the lease be absolutely void, the successor hath no remedy at law for any rent incurred after the death of his predecessor.

Poph. 121; Leon. 309.

So, the lessee of a voidable lease, after the death of the lessor, may maintain an action of trespass against any stranger, who shall enter or do any other act of trespass upon the land before the lease be actually avoided.

Leon. 309.

2. *By what Means and in what Cases such voidable Leases may be made good.*

This in a great measure has been explained under the foregoing division: it remains only to show, that, besides acceptance of the rent, there are other ways by which such voidable leases may be affirmed; as, by distraining for rent due at the death of the predecessor; or by bringing an action of waste against the lessee; or, in case the lease be for life or lives, by bringing an assize for the rent due after the death of the predecessor; or acceptance of fealty from the lessee: all these amount to an affirmance of such voidable leases, and make them good against the person who so affirms them, for his own time; because these acts show a sufficient intent in the successor to continue and acquiesce in the leases made by his predecessor.

Dyer, 239; Fitz. tit. *Abbott*, 9; Bro. tit. *Acceptance*, 15.

3. *The Manner of avoiding such Leases as are only voidable.*

This may be done either by entry, where the lease is of things corporeal and manurable; or by claim, where the lease is of things incorporeal: as, where a lease for years is made, rendering rent, upon condition to be void for non-payment; this lease shall not be void without a demand made of the rent: for if it were otherwise, it would be in the power of the lessee to make the lease void at any rent-day he thought fit, and so to add the wrong of making the lease void to that of non-payment of the rent.

Dyer, 222, Ayer and Ome; Sid. 7, Young and Wright; Dyer, 28 a, in margin.

And where an entry is to be made, this may be done either by the bailiff of the party that would enter, or by other persons deputed for that purpose. But a bailiff, merely in virtue of his office, cannot make an entry for his master without special warrant, because his office is to manage his master's lands, and take the profits thereof to his master's use; but to gain new lands, which the master had not before, does not belong to his office as bailiff. Besides, an entry being a thing which the master may or may not make, his bailiff shall not determine his election therein.

Moore, 52; Dyer, 222.

Where a corporation aggregate have title of entry to avoid a lease, they cannot command their bailiff to enter, unless it be by deed; for their parol command in such case is void, and the entry thereupon tortious, because as a body politic they are invisible, and incapable of acts as natural persons are. But yet, *per curiam*, if one distrains as bailiff to a corporation, though in truth he be not bailiff, yet he may make conusance as such, and if the corporation agree thereto, it is good without deed, because the command he had in such case is not traversable.

Roll. Abr. 514 b, Dumper v. Syms; Bro. tit. *Corporation*, 9; 6 Co. 38; 4 Co. 119.

But a bishop may by parol command his servant to demand a rent or make an entry, and this is good; because as a sole corporation he is capable of the same acts as all natural persons are.

4 Leon. 181, Wood v. Chiver.

A dean and chapter made a lease for years, rendering rent, but for default of payment the lease to be void: the rent was in arrear, and not paid: then they made a new lease to another person, and affixed their seal to it in the chapter-house, before any entry made upon the first lessee, and at the same time made a letter of attorney to one to enter, and make delivery of this lease upon the land, who accordingly did it. It was objected, that this second lease was void, because the deed being perfected as the deed of the corporation by their affixing their seal to it, the delivery after by the attorney was void, it being perfect before; and the first perfection of it as a deed could not make it a good lease for years, because the first lessee was in possession, and they made no entry to avoid it. But it was held to be a good lease, and that there was no other means for a corporation to make a lease but this: and Gawdy said, it was not the deed or lease of the corporation till delivery, as of another person; and therefore, where it is said in Davis, 44, to be agreed, that if a dean and chapter put their chapter seal to a deed, this is a perfect deed thereby, without any delivery; this must be understood when the dean and chapter are in possession, not when they are out of possession, or have only a right. And so the diversity appears to be taken upon the books; for otherwise the lease must be inevitably void in such case; for till it be sealed, the attorney cannot deliver it as the deed of the corporation; and if the sealing perfects it presently as their deed, so that it cannot be delivered after, then it is void for want of an entry, and so all ways the lease would be void; which would be a very unreasonable construction, when it may be so easily avoided. And in the latter books it is said, that though the putting of the seal of a corporation aggregate to a deed carries with it a delivery, yet the letter of attorney to deliver it upon the land suspends the operation of it as an escrow till entry, &c. But yet the corporation, if they think fit, may after the indenture of lease engrossed make a letter of attorney to another, to seal and deliver it as their deed or lease to the lessee upon the land, without first affixing their seal to it: and so it was done in the case of the warden and fellows of All Souls College in Oxford. But then, as it seems, the attorney must affix the corporation seal to it, and not any other seal. Yet in one book it is held *per curiam*, that a corporation aggregate, as there the president, fellows, and scholars of St. John's College in Oxford, making a lease, are to subscribe and seal it, and then deliver it by their attorney, having a letter of attorney for it, and that they could not deliver it in any other manner; but whether the attorney might also affix their seal or not, is not mentioned in the case.

Cro. Eliz. 167; 2 Leon. 97, Willis v. Jermin; Dav. 44; 1 Roll. Abr. 23, Flud v. Gregory; Vent. 257; 3 Keb. 307, Good v. Ash; Leon. 106, Carter v. Claypool; Bulstr. 119, President, &c., of St. John's College v. Lord Norris.

(I) Of Leases made by those who have but a particular Estate or Interest in the Lands leased: And herein,

1. *Of Leases made by Tenant in Dower or Curtesy.*

As to these, it will be sufficient to observe, that if tenant in dower or by the curtesy make a lease for years, reserving rent, and die, this lease is absolutely determined, so that no acceptance of the rent by the heir or those

in reversion can make it good. For though their estate is *quodam modo* a continuance of the estate of the husband or wife, yet it is a continuance of it only for life, and they have no power to contract for, or intermeddle with the inheritance, and, consequently, their leases or charges fall off with the estate whereout they were derived, and the lessee is become tenant by sufferance by his continuance of possession after.

Bro. tit. *Acceptance*, 14, 19, tit. *Leases*, 17, 19; Plowd. 30, 272; Cro. Car. 398; Jon. 354; Vaugh. 80, 81.

2. *Of Leases made by Tenant for Life.*

Tenant for life can make no leases to continue longer than his own life.(*a*) But, if tenant for life makes a lease for twenty years generally, and after he in the reversion confirms that lease, and then the tenant for life dies; though this at first would have determined by the death of the lessor, yet the confirmation hath made it good and unavoidable for the whole term. But, if the lease had been for twenty years, if the lessor tenant for life should so long live, there, if the reversioner had confirmed this lease, yet it would not prevent its voidance upon the death of the tenant for life. The diversity between which cases is this, that in the first case the lease being made generally for twenty years, nothing appears to the contrary but that it was a good lease for that time absolutely; for the death of the lessor, which would determine it sooner, does not appear in the lease itself: then when the reversioner, who alone could take advantage of that implied limitation, thinks fit to wave it, and confirms the lease, as it was made at first, for twenty years absolutely, this makes it his own lease for so much of the time as would have fallen into his reversion by the death of the tenant for life, before the twenty years run out: but in the other case, the death of the tenant for life being made the express limitation and circumscription of the twenty years in the lease itself, no confirmation of that lease, as so limited, can enlarge it to extend beyond the life of the lessor, that being the express determination affixed to it.

Poph. 50; Co. 147, Anne Mayowe's case. (*a*) [His leases are merely void upon his death, and cannot be set up against the remainder-man by his acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession. Doe v. Butcher, Dougl. 50;] ‖ Jones v. Verney, Willes, 169; Jenkins v. Church, Cowp. 482; Doe v. Archer, 1 Bos. & Pull. 531. But acceptance of rent, as rent, may operate as an admission by the remainder-man that the lessee is his tenant, and so entitle him to notice to quit, Doe v. Watts, 7 P. R. 83, and the tenancy in that case will be guided by the terms of the lease, and expire with the old year. Roe v. Ward, 1 H. Bl. 97; Doe v. Weller, 7 T. R. 478. And under some circumstances, equity will compel the remainder-man to grant a new lease. Roe v. Prideaux, 10 East, 158.‖

And yet we find one case where it is held, that if a man makes a lease for twenty-one years, if the lessee so long live, and after the lessor and lessee join in a grant by deed of the term to another, and after the first lessee dies within the twenty-one years, that yet the grantee shall enjoy it during the residue of the term absolutely. But to reconcile this case with the other, it must be intended, that in the assignment no notice is taken of the express limitation affixed to the lease, but that they joined in an assignment of the lease for the residue of the twenty-one years, and then it may well be construed to amount to a *confirmation by the lessor* for that time, as the lessor may confirm the land to the lessee for any longer time, and thereby enlarge his estate or interest.

10 Co. 49 a.

If A, lessee for the life of B, make a lease for years by indenture, and

after purchase the reversion, and then B die, A shall avoid his own lease, notwithstanding he hath now an estate capable of supporting the lease for the whole term; for he may confess the lease for years as it was, and avoid it by showing his own estate in the lands at the time of that lease made; and he is not estopped to do this, because the lease took effect in point of interest.

Co. Lit. 47 b; 6 Co. 15 a; Roll. Abr. 878.

B, tenant for life of C, and he in the remainder or reversion in fee, join in a lease for years by indenture; this during the life of C is the lease of B, who then only had the present interest in the lands, and the confirmation of him in the remainder or reversion; but after the death of C, then this becomes the lease of him in the reversion or remainder, and the confirmation of B: for the lessors having several estates in them in several degrees, the lease shall be construed to move out of each one's respective estate or interest as they become capable of supporting it, which is the most natural and useful construction of the lease, especially as there can be no estoppel in this case, by reason of the several interests which passed from each. And therefore during the life of tenant for life, if the lessee, being evicted, should declare of a lease by both, this would be against him, as was adjudged, because for that time it was only the lease of the tenant for life.

Co. Lit. 45 a; Dyer, 234 b; Moore, pl. 196, pl. 939; Poph. 57; 6 Co. 14.

[A tenant for life, and B the reversioner: A only executes a lease, in which they are both named: upon A's death, this lease is totally void. And though B should execute it afterwards, it will not bind the lessee: for it is not his covenant.

Ludford v. Barber, 1 T. R. 86.]

3. *Of derivative Leases, or by one who is but a Lessee for Years himself.*

As a lessee for years may assign or grant over his whole interest; so he may grant it for any fewer or less number of years than he himself holds it; and such derivative lessee is compellable to pay rent, perform covenants, &c., according to the terms agreed in such grant or agreement. Also it is said in (*a*) Broke, that a termor so assigning may distrain for the rent, without any power reserved for that purpose, though a person who assigns his whole interest cannot, because he has no reversion.

Vide tit. *Assignment and Covenant.* (*a*) Bro. tit. *Distress*, 7.

For a derivative lessee is not liable to the rent reserved on the original lease, otherwise than as his cattle may be liable to a distress for rent-arrear to the original lessor, as any stranger's levant and couchant may be; for there is no privity between him and the original lessor, as there is between a lessor and assignee; and therefore such-a-one, though he take the whole term, except one day, shall not be liable to any of the covenants in the original lease.(*b*)

2 Vern. 175, 374, and vide Cro. Eliz. 157; Leon. 279; [Holford v. Hatch, Dougl. 183. (*b*) Hence, a derivative lease cannot have the effect of working a forfeiture under a proviso not to assign. Crusoe v. Bugby, 3 Wils. 234; 2 Bl. Rep. 766.]

[When the whole term is made over by the lessee, although in the deed by which that is done, the rent and a power of entry for non-payment, are reserved to him, and not to the original lessee, this is an assignment, and not an under-lease: and therefore, the original lessor, or his assignee of the reversion, may sue or be sued on the respective covenants in the original

lease: and this, although new covenants are introduced in the assignment.

Palmer v. Edwards, Dougl. 187, note. But such a departure with the whole term, if bad as an assignment, not being in writing, would be supported as an under-lease against the grantor. Poulteney v. Holmes, 1 Str. 435; Dougl. 186.]

Lessee of a prebend made an under-lease, and the lease being pretty far spent, he requested the tenant to surrender, to enable him to renew, and offered to give any security to grant him a new lease for so many years as he had to come in his old one; but the tenant was obstinate and would not, unless his landlord complied with some demands of his; upon which the landlord brought his bill in equity to enforce him to a compliance: but my lord keeper said, though it were a benefit to the plaintiff, and no prejudice to the defendant, yet there being no agreement in the deed for that purpose, he could do nothing in it.

Pr. Ch. 124, Colchester v. Arnot; 2 Vern. 383, S. C.

But now by the 4 G. 2, c. 28, § 6, it is enacted in the words following, viz. "Whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and whereas many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewing of the principal lease, by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees; for preventing such inconveniences, and for making the renewal of leases more easy for the future, be it enacted by the authority aforesaid, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid, to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons, in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof; and the under-lessees shall hold and enjoy the messuages, lands, and tenements, in the respective under-leases comprised, as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease, out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease; any law," &c.

See also 39 & 40 Geo. 3, c. 41, § 10, *supra*, 517.

4. Of Leases made by a Disseisor or Disseisee.

If a disseisor makes a lease for years, or grants a rent-charge, and the disseisee confirms it, and after re-enters, yet he shall not avoid the lease or rent, because by his confirmation of them he hath departed with so much of

his ancient right, which incorporates and mixes with the lease or grant, so that he can never after avoid them.

Co. Lit. 300; Poph. 50.

If one be disseised of lands, and whilst he is out of possession he intend to make a lease for years, the way is to prepare a deed of lease, and after he hath signed and sealed it, before any actual delivery thereof, as his deed, to deliver it is an escrow to a third person, to be delivered as his deed after entry and actual possession taken in his name. Or after signing and sealing before actual delivery, he may make a letter of attorney to a third person, to enter upon the land in his name, and after such entry to deliver it upon the land, or elsewhere, as his deed, to the lessee; and though such letter of attorney be affixed to the deed, (and to make it an effectual letter of attorney, it must be sealed and delivered,) yet the sealing and delivery of that by the lessor, though affixed to the deed of lease, will not be construed a delivery of the lease itself, because no such intent appears, but the contrary; and therefore the delivery of the letter of attorney shall have no more influence upon the deed of lease, than if it had not been affixed thereto. Or such disseisee may prepare a deed of lease, and at the same time execute a letter of attorney to a third person, to enter upon the land, and after such entry to sign, seal, and deliver the lease as his act and deed to the lessee. And all these ways are good, because the delivery is the essential and finishing part of a deed; and if the possession and seisin be reduced before that comes, the delivery after is as effectual as if the whole deed had been prepared and executed after; because till the delivery, the deed took no effect, and when the delivery was, he was in actual possession, and consequently, might make such lease. But, if such disseisee, being out of possession, had sealed and delivered the deed of lease as his deed, though he had after actually entered upon the land, and then delivered the lease again as his deed, yet no interest would pass to the lessee by either of these deliveries; for, as his deed it took absolute effect by the first delivery, and then the second delivery to make it his deed, was void and to no purpose; for a deed cannot have two deliveries: and the first delivery, to make it a lease, was void, because he was then out of possession, and had only a right of entry, which he could not transfer to a stranger; and therefore the lease is absolutely void to carry any interest to the lessee. And so it would be, if after such delivery of it as his deed, he had made a letter of attorney to enter and deliver it as his deed upon the land; for the first delivery made it his deed effectually; but that could pass no interest, because he was then out of possession; and the second delivery to make it a deed was void, because it was his deed by the first delivery, and therefore cannot be delivered again. And *quære*, in the case above mentioned, if the letter of attorney were at the conclusion of the deed of lease in the very same parchment or paper, whether the disseisee could distinguish his sealing and delivery of that as a letter of attorney, so that it should not amount to a sealing and delivery of the deed itself, and thereby make void any after-delivery, when the possession and seisin were reduced?

Co. Lit. 48 b; Cro. Eliz. 483, Stephens v. Elliot; 3 Co. 35; 3 Cro. Eliz. 446, Jennings v. Bragg; 2 Bendl. 81; 2 Roll. Abr. 25, Davis v. Fawkener; Cowp. 203.

The heir after the death of his ancestor, before any actual entry, may make a lease for years, because the possession in law was cast upon him immediately by the death of his ancestor, and none had possession in fact. But, if a stranger first enter by abatement, then such lease made by him after will

be void; because by the entry the stranger gains possession in fact, which devests the possession in law of the heir, so that the heir hath neither possession in fact nor law whereof to make a lease, and consequently, the lease must be void.

Plowd. 137.

If the heir of the king's tenant *in capite*, or in socage, before livery, or after office found, makes a lease for years, this seems to be good; for such lease being only a contract between the lessor and lessee, may be made before any actual entry, by reason of the possession and seisin in law, which were cast on him by the death of his ancestor. But, if he make a feoffment in fee, or a lease for life before livery sued, these cannot be made without actual entry into the land to make livery of seisin; and such entry would be an intrusion upon the king's possession, and amounts to a forfeiture, by attempting to take a freehold out of the king.

Bro. tit. *Leases*, 57; Sav. 55.

β When the lessor, at the time of making the lease, had no right by deed, record, or possession, and the lessee had, at the same time, a perfect title, by an exclusive and uninterrupted possession for more than fifteen years; it was held that such lease was not beneficial to the lessee.

Camp v. Camp, 5 Conn. 291.

When the tenant attorns to stranger, the attornment is void, yet if the tenant has been expelled from the premises, the landlord is by that act disseised of the freehold, and the tenant may take a lease from the disseisor.

Foster v. Morris, 3 Marsh. Kty. Rep. 611. See Fowler v. Cravens, 3 J. J. Marsh. 429.γ

5. *Of Leases made by Joint-tenants or Tenants in Common.*

As to leases by joint-tenants and tenants in common, we shall here, for method sake, set down some of the most remarkable cases relating thereto, though these matters are more fully treated of under their proper heads.

1. Then, if two joint-tenants are in fee, and one lets his moiety to J S for years, to begin after his death, this is good, and shall bind the other, if he survives; because this is a present disposition, and binds the land from the time of the lease made, so that he cannot after avoid it. But a devise for years in such manner by one joint-tenant would not bind the other surviving, because that is no present disposition, nor binding upon the devisor himself, inasmuch as he may revoke or cancel his will, and so destroy that devise; and therefore such devise, not taking effect to any purpose till his death, comes too late to prevent the survivorship, which, being the elder title, shall be preferred, and shut out the devise. So, all grants or charges by one joint-tenant out of the land fall off with his life, and cannot affect the survivor, because they being no immediate disposition of the land itself, that comes whole and entire to the survivor under the first title, and, by consequence, over-reaches all intermediate charges or grants thereout by the other joint-tenant who is dead.

Co. Lit. 163; Bro. tit. *Grants*, 154; Roll. Abr. 848.

But, if one joint-tenant grants *vesturam* or *herbagium terræ* for years, and dies, this shall bind the survivor. So, if two joint-tenants are of a water, and one grants a separate piscary for years, and dies, this shall bind the survivor; because in these cases the grant of the one joint-tenant gives an immediate interest in the thing itself whereof they are joint-tenants.

Co. Lit. 186.

(I) Leases by those who have but a particular Estate, &c.

If two joint-tenants for life are, and one of them makes a lease for years of his moiety, either to begin presently, or after his death, and dies, this lease is good and binding against the survivor; the reason whereof is, that notwithstanding the lease for years, the joint-tenancy in the freehold still continues, and in that they have a mutual interest in each other's life, so that the estate in the whole, or any part, is not to determine or revert to the lessor till both are dead; for the life of the one, as well as of the other, was at first made the measure of the estate granted out by the lessor; and therefore so long as either of them lives, if the joint-tenancy continues, he is not to come into possession. Now these joint-tenants having a reciprocal interest in each other's life, when one of them makes a lease for years of his moiety, this does not depend for its continuance on his life only, but on his life and the life of the other joint-tenant, whether of them shall live longest, according to the nature and continuance of the estate whereout it was derived; and then, so long as that continues, so long the lease holds good, and, by consequence, such lessee shall hold out the surviving joint-tenant and the reversioner, till the estate, whereout his lease was derived, be fully determined. But, if a rent were reserved on such lease, this is determined and gone by the death of the lessor, for the survivor cannot have it, because he comes in by title paramount the lease; and the heirs of the lessor have no title to it, because they have no reversion or interest in the land. But *quære*, if the executors or administrators cannot maintain an action of debt or covenant, either upon the covenant in law, or express covenant, for payment of the money, if there be any?

Moore, pl. 514; Poph. 96, Harbin v. Barton; 3 Bulstr. 273; Roll. Rep. 401; Dyer, 187; Plowd. 263; Cro. Ja. 91; 3 Bulstr. 131; Co. Lit. 184 b; Co. 96; Co. Lit. 185, a; Moore, 139.

A and B joint-tenants for their lives; A by indenture leases the moiety which he holds in jointure with B to C for sixty years from the death of B, if he the said A shall so long live, and demises the other moiety to C for sixty years from his own death, if B shall so long live; then A dies, and B survives: it was adjudged, that this lease was void for both moieties; for by the first words it was a good lease from A of his part, upon the contingency of his surviving B, but that never happened; and as to B's part, A had no power to lease or contract for it during the life of B, though he had happened after to survive him, for that it was but a bare possibility, which could not be leased or contracted for; and therefore the lease was void in the whole.

Whitlock v. Horton, Cro. Ja. 91; Moore, 776, S. C. by the name of Whitlock v. Hartwell; Noy, 14, S. C. by the name of Whitlock v. Chartwell.

A and B joint-tenants for their lives, A leases his part for sixty years, if he and B so long live, then B surrenders his part, and takes back a new estate; then A dies, living B; it was adjudged, that this lease made by A was determined by his death; for the joint-tenancy, which would have given them, or their lessees, an interest in each other's life, is by the surrender of B determined and gone, and then the lease of A stood single on his own life, and, consequently, by his death is determined. So it would be, if after such lease for years by one joint-tenant, they had made partition of the joint-estate, and then the lessor had died, his lease would be at an end, because the joint-tenancy which should have supported it after his death, is by the partition defeated and gone.

Cro. Ja. 377; Roll. Rep. 309; 3 Bulstr. 130; Roll. Abr. 831, Daniel v. Waddington.

(I) Leases by those who have but a particular Estate, &c.

If one joint-tenant or tenant in common makes a lease for years of his part to his companion, this is good; for this only gives him a right of taking the whole profits, when before he had but a right to the moiety thereof; and he may contract with his companion for that purpose, as well as he may with any stranger.

Co. Lit. 186 a; Cro. Ja. 83; Moore, pl. 194; Roll. Abr. 851. *Supra*, 283.

6. *Of Leases made by Copyholders.*

If a copyholder takes upon him to make leases, not warranted by the custom of the manor, and without the lord's license, this is a forfeiture of his copyhold, but no disseisin to the lord; and the lease is good against everybody but the lord.

Moore, 184; Salk. 186, pl. 5.

And it seems not to be material whether such lease be by parol or in writing; but it must be a perfect lease, and must have a certain beginning and certain end, for otherwise the lease is void, and carries but an estate at will at most; which is no forfeiture.

Moore, 392; Hetl. 122; Bulstr. 189.

A, copyholder for life, having got B to be bound with him for 100*l.*, and given him a counter-bond, executes a deed, whereby reciting the counter bond, and the estate A had in the lands for life, A covenants, grants, and agrees for himself, his executors, administrators, and assigns, with B, that he, his executors and administrators, should hold and enjoy these lands, from the making of the deed, for seven years, and so from the end of seven years to seven years, for and during the term of forty-nine years, if A should so long live, with a covenant, that if the 100*l.* were paid, and B indemnified, the deed should be void: the question was, whether this would amount to a lease for forty-nine years, if the copyholder should so long live; and so being in the case of a copyhold, and no custom to warrant such lease, be a forfeiture of the estate. And it was argued to be no lease, because such construction would be a wrong to both parties; to the one, by defeating his security, and to the other, by a forfeiture of his estate; which would be unjust; when by construing it only to be a covenant for the whole, each might be safe, and their intention answered. And it was said, that the cases, wherein such words have been held to amount to a lease, were all of them of freehold, where no such mischief could ensue. But the court, notwithstanding, inclined this was a good lease by the intention of the parties, and, consequently, a forfeiture. [And that a license could not be supposed to prevent a forfeiture,] for then the jury would have found it so. But, if the words had been doubtful, and such as would admit of divers constructions, there, to prevent a forfeiture, it should be taken to be only a covenant; but here, the words are plain and clear. But no judgment was given.

2 Mod. 79, Richards v. Seley.

A copyholder, by articles of agreement, covenanted and promised with another, that he should hold for a year at *halves*, *according to the custom of the manor*, at such a rent, and so from year to year for five years: this was adjudged no forfeiture, for the prejudice that would ensue on such construction to the copyholder. Also, the lease being worded *secundum consuetudinem manerii* is tied up to the custom of the manor; so that if there be no custom to warrant this manner of leasing, the lease itself falls to the

ground. Also, there was further in the lease a covenant, that if the lessor put out the lessee, he should be allowed so much rent by way of retainer; so that the lessee was at uncertainty whether he should enjoy it during the whole term; for this gave the lessor liberty to put him out, making the allowance agreed upon and stipulated between them. And besides, it was doubted if the words *covenant and promise that he should enjoy* for such a time, would amount to a lease, or were not rather relative to enjoying after a lease made: for the word *covenant* is none of those reckoned up to make a lease; and in the cases where it hath been so held, it was joined with the word *agreavit*, which imports a mutual consent or agreement of both parties; and here, though there be the word *agreed* or *agreement*, yet it is only in the style of the articles. Also, here, the covenant is quietly to enjoy, which *a fortiori* does not make a lease, but regards only the manner of enjoying it after a lease made, and being only to hold at halves, it can be no lease. This is the manner of reporting this case, which arises so by jumps and steps, and is so incoherently put, that it is hard to conclude any thing from it relative to the matter before us. Besides that the gist of the case seems to turn upon the words *holding at halves*; for they are to govern and explain the words *covenant and promise*, which of themselves may be applied to ten thousand other things, and have no meaning at all, till the subsequent words explain what it is he covenants and promises: and the words *holding at halves* are of so ambiguous and doubtful a signification, that according to the rule taken in the foregoing case, they might well leave room for the court to make such a construction as should prevent a forfeiture: and in one case it is expressly held, that *exposing to half* is no lease, but only a liberty to plough and sow, but passes no interest, nor can the lessee have trespass for breaking the soil: but in the same book it is said, that if he had exposed it to halves for two or three *crops*, this had been a lease.

2 Keb. 267, Lenthall v. Thomas; Cro. Eliz. 143, Hare v. Celey.

An infant copyholder, without license of the lord, made a lease for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ousted the lessee. In this case, though it was agreed, that a lease for years, rendering rent, by an infant of freehold lands was only voidable; yet it was urged, that in case of a copyhold it would be otherwise; because the lease not being warranted by the custom, would be a disseisin to the lord, and, consequently, a forfeiture of his copyhold, which being a great mischief to the infant, the court ought rather to help him by adjudging such lease to be absolutely void. But, notwithstanding this, it was adjudged, that the lease was a good lease till avoided, and that a lease for years by a copyholder without license is not a disseisin: and admitting it should be a forfeiture in this case, yet if the lord enters for it, the infant may re-enter upon him, and so is at no mischief; and therefore he, having accepted the rent at full age, hath made it good and unavoidable. And Jones says, that it was held to be no forfeiture as to the lord; but that admitting it were, yet it was a good lease as to all strangers; and that for this reason principally it was adjudged such acceptance had made it good.

Latch. 199; Godb. 364; Jon. 157; Noy, 92, in all the S. C., between Ashfield and Ashfield.

A copyholder for life made a lease for a year by indenture, dated such a day, and the same day, by another indenture, makes a second lease to the same party for a year to commence such a day, being two days after the

first lease should expire; and by another indenture dated the same day and year, makes a third lease of the same lands to the same party, to commence such a day, being two days after the second lease would expire; and so betwixt each lease two days betwixt the beginning of the new lease and the end of the former; and if this was a forfeiture of his estate, because the custom of the manor warranted a lease but for a year only, was the question. And it was agreed, that whether the custom of the manor, or the general custom of the realm, allows a copyholder to make a lease for a year, this ought to be a lease in possession, and he cannot, after such lease made, make another in reversion; and these three leases being made all at one time, shall be intended one entire contract, and so a lease for three years, which is more than the custom warrants, and, consequently, a forfeiture; and the intervention of two days between each lease was but a fraud and covin to defeat the lord of his forfeiture, which shall not avail: and therefore it was adjudged against the copyholder, that he had forfeited his estate.

Cro. Car. 233; Jon. 249; Roll. Abr. 508, Matthews v. Wheaton.

So, where a copyholder, who by the custom of the manor could make a lease for one year only made a lease for a year excepting the last day of the year, *et sic de anno in annum*, excepting the last day of every year, during his own life; this was adjudged by all the court clearly to be a forfeiture, and the exception of a day at the end of every year to be only a shift to evade the custom; which it cannot do; for it is a lease certain for two years at least, excepting two days, which in effect is a lease for more than one year; and if he might by such exception of a day or two, at the end of two years, get out of the reach of a forfeiture, he might then make a lease for twenty years, or what other time he thought fit, which the law will not permit; and in Bulstr. this manner of leasing appears expressly to have been by articles, by way of covenant, that he should have the land in that manner, not by words of immediate leasing, which makes this a direct authority, that a covenant that he shall have or enjoy such lands amounts to an immediate lease, and not a covenant barely; and though it were in case of a copyhold, yet it would not save the forfeiture.

Cro. Ja. 308; Bulstr. 215; Roll. Abr. 507, Lutterell v. Weston.

So, if a copyholder makes a lease for a year, *et sic de anno in annum*, during ten years, this is clearly a good lease for ten years, and if not warranted by the custom, will be a forfeiture of his estate.

Roll. Abr. 508; Bulstr. 190; Cro. Ja. 301; 2 Mod. 81.

These cases being so adjudged, and that a copyholder cannot, either by way of covenant, or of executory and renewable leases annually, prevent the forfeiture of his estate, if he exceeds the number of years warranted by the custom, and has no license from his lord for that purpose; let us see if there be any way yet found out to avoid this mischief, and yet make over to the lessee some certainty that he shall enjoy the lands after the term warranted by the custom is expired, without which few will care to take leases for so short a term as the customs of most manors generally allow. And we find one case where an attempt of this kind was made, and it seems to have succeeded accordingly: the case was this: A copyholder made a lease for a year only of his copyhold land, according to the custom, and covenanted that after the end of this year the lessee should have or enjoy the same lands for another year, and so *de anno in annum* for ten years; this was held by

Yelverton, Justice, to be no such lease as would make a forfeiture, because he had a lawful estate but for one year only; and the court agreed with him herein. And this seems to be a very reasonable construction; for when he had in express terms leased it but for one year only, and after in the deed covenanted for the lessee's having or enjoying it for a longer term, this variation in the manner of expression must vary the sense of it likewise; for now it appears that he intended by the covenant something different from the lease itself, otherwise he would not have departed from that form of expression, which was the most proper and natural whereby to signify his intention of leasing; and then it would be unjust and unnatural to strain the covenant, which has a meaning proper and peculiar to itself, to signify the same with the first part of the deed, which varies not only in form, but was also intended to quite another purpose.

Cro. Ja. 301; Bulstr. 190, Lady Mountague's case.

And perhaps in such covenant it may be still better if it were worded *to permit and suffer* the lessee to have, hold, and enjoy the lands in such a manner; for a covenant in that form, even of freehold lands, will not amount to an immediate lease, because the words *permit and suffer* prove that the estate is still to continue in him from whom the permission is to come; for if any estate thereby passed to the covenantee, he might hold and enjoy it without any permission from the covenantor; and therefore in such case the covenantee hath only the bare covenant for his security of enjoyment, without any actual estate made over to him.

Roll. Abr. 848; 3 Bulstr. 252; 2 Mod. 81.

[In ejectment for a copyhold, the defendant produced a paper-writing, written upon an agreement stamp, under the hand and seal of T. Tidd, of whom the lessor of the plaintiff purchased, made between T. Tidd and T. Clare, (the defendant,) reciting, that M S was seised of the premises in question for her life; and that Tidd had agreed with Clare, that *in case he should be seised of the premises on the death of M S he would immediately on her death demise and let them to* Clare, on the terms and conditions mentioned: "Now therefore the said Tidd *doth hereby agree to demise and let* unto the said Clare, all, &c., and all such copyhold premises as he shall or may be entitled to on the death of the said M S, to hold *from and immediately after the death of M S, for the term of* 21 *years*, at the yearly rent of 12*l.* 12*s.* And the said Tidd doth hereby promise and agree to and with the said Clare, that he the said Tidd, on the death of the said M S, and on his becoming entitled to the said premises, *shall and will procure a license to let the said premises.*" Lord Kenyon was of opinion, at the trial, that the instrument amounted to a lease, there being words of present demise contained in it, and therefore nonsuited the plaintiff. But on the motion for a new trial, his lordship said that having consulted with the other judges, he was clearly convinced he was mistaken in the opinion which he had holden at the trial; and that they were all of opinion, that the instrument in question was an executory agreement only, and not a lease, for two reasons: first, because if this were holden to be a lease, a forfeiture would be incurred; whereas that would be contrary to the intent of the parties, who had cautiously guarded against it by the insertion of a covenant, that a license to lease should be procured from the lord (*a*): and, secondly, the stamp is conformable to the nature of an agreement for a lease, and not to a lease itself.

Doe v. Clare, 2 T. R. 739. (*a*) So Doe v. Morris, 2 Taunt. 52.]

(I) Leases by those who have but a particular Estate, &c.

‖ Where a copyholder demised for one year, and from thence for year to year for the term of thirteen years more, *if the lord would license, and so as the same should not be liable to forfeiture;* it was adjudged, that it was not a lease for the fourteen years, and, consequently, that an ejectment would lie after the expiration of the first year; and that if the tenant should be evicted by such ejectment, no action could be maintained on the covenant for quiet enjoyment.

Doe v. Luffkin, 4 East, 221; Luffkin v. Nunn, 1 N. R. 163.

So, on a demise of freehold and copyhold lands at one entire rent, *habendum*, as to the freehold for twenty-one years, and as to the copyhold for three years, warranted by the custom, with a covenant for renewal of the copyhold every three years, *toties quoties*, during the twenty-one years; and that in the mean time, and until such new lease should be executed, the lessee should hold the said land, as well copyhold as freehold, according to the terms of the lease; it was holden, that this was a lease of the copyhold only for three years, and that no new lease having been granted after the first three years, the lessor might recover those premises in ejectment. And Dampier, J., referred to Lady Montague's case as in point, and said that the lessee's remedy lay on the covenant, for the court could not by construction, in order to avoid circuity of action, make words which import only a covenant, a lease inconsistent with the nature of the estate.

Fenny v. Child, 2 M. & S. 255.‖

7. *Of Leases made by Executors or Administrators.*

Executors and administrators, as they may dispose absolutely of terms for years vested in them in right of their testators or intestates; so may they lease the same for any fewer number of years, and the rent reserved on such leases shall be assets in their hands, and go in a course of administration.

Vide tit. *Executors and Administrators.*

So, where lessee for fifty years of a reversion expectant upon a lease for life makes his will in writing, and thereof appoints one B, his son, an infant of three years of age, executor, and dies; administration is granted to C *durante minori ætate* of B generally; then C makes a lease for ten years, without reserving any rent, for aught appears; yet this lease was held good, because, by the ecclesiastical law, *minor* 17 *annis non admittitur fore executor;* and therefore administration being granted generally during his minority, the whole term and power of disposing thereof, for that time, vests as absolutely in the administrator as it would have done in the executor himself, if he had been of an age capable of acting therein; because for that time the testator died *quasi intestatus*, and the administrator for that time hath the same power as if he had actually died intestate; and therefore such lease is good, at least till the executor attains his age of seventeen years, when such administration ceases. And some held, that such lease would hold good after, till the executor avoided it by actual entry, by reason of the general power which such administrator had in the mean time; and therefore such continuing acts are not *ipso facto* determined by the ceasing of the administration, but are only voidable in the same manner as other leases would be, viz., by an entry of the executor, when he comes to take upon him that office.(*a*) But, if the administration had been special, *ad opus, commodum, et utilitatem* of the executor during his minority, *et non*

aliter, nec alio modo, as it was in Prince's case, then none could make title by virtue of such a lease made by such special administrator, even during the minority of the executor; for the nature and manner of the administrator's power appearing in the very title which the lessee must make to such lease, this lease would appear not to be pursuant thereto, because it could not be of necessity, nor for the use or advantage of the infant, since it could not take effect during the life of the tenant for life; and therefore such lease would be condemned as void presently.

6 Co. 63, 67 b, Sir Moyle Finch's case; vide 5 Co. 29, Prince's case. (*a*) Price v. Simpson, Cro. Eliz. 718.

‖ It is competent to an executor to dispose of a term, or make an underlease, before probate; (*a*) but if he has refused to administer, he cannot dispose of the term after administration has been granted to another.

Roe v. Summers, 2 Bl. Rep. 692. (*a*) Broker v. Charters, Cr. El. 92, Ow. 44; Moore, 272, S. C. by the name of Bewacorne v. Carter; 1 Leon. 135, S. C. by the name of Sir Henry Goodier's case; Godolph. O. L. 142, S. C.

We have already seen, that several executors are considered in law but as one person; and, consequently, a grant by one is as effectual as if all had joined; and it matters not whether it be made in his own name, or purport to be the grant of all, and one only execute it.

Supra, vol. iv. 37; Doe v. Sturges, 2 Marsh. 505; 7 Taunt. 217, S. C.; Simpson v. Gutteridge, 1 Madd. Ch. Ca. 616. ‖

8. *Of Leases made by a Bailiff of a Manor.*

A bailiff of a manor cannot, by virtue of his office, make leases for years; for his business is only to collect rents, gather the fines, look after the forfeitures, and such like; but he hath no estate or interest in the manor itself, and therefore cannot contract for any certain interest thereout. But the lord of the manor may give him a special power to make leases for years, as he may do to any stranger; and then such leases, if they are pursuant to the power, and made in the name of his lord, will be good as leases by the lord himself: for the bailiff, though he hath such power, cannot make them in his own name. But a general bailiff of a manor may make leases *at will*, without any special authority, because being to collect and answer the rents of the manor to his lord, if he could not let leases at will, the lord might sustain great prejudice by absence, sickness, or other incapacity to make leases, when any of the former leases were expired; and such leases at will are for the benefit of the lord, and can be no ways prejudicial to him, because he may determine his will, when he thinks fit.

Bro. tit. *Baily*, 40, 41, tit. *Leases*, 37; Cro. Ja. 99; Roll. Abr. 339.

But, if a bailiff of a manor hath a special power to make leases for years, as he ought to make them in the name of his master, so they ought to be made in writing, that the authority may appear to be pursued: therefore, where a bailiff constituted by writing to receive rents, manage and let the lands, made a parol lease for eleven years, and the lessee, being turned out at law upon an ejectment, brought a bill for relief in Chancery, the bill was dismissed, because he had only a parol lease, which the bailiff had no power to make.

2 Ch. Ca. 202, Rothwell v. Sir Charles Hussey.

‖ The committee of a lunatic has no interest, and is considered only as a bailiff, and, consequently, cannot make a lease for years, except by order of the Court of Chancery. It was indeed doubted, whether even such a lease

made by order of the court was good at law, the king himself not having power to make a lease of the lunatic's estate; and to remove that doubt, the statutes of 11 Geo. 3, c. 20, and 43 Geo. 3, c. 75, were passed, which enable the Court of Chancery to lease such estates.

Drury v. Fitch, Hutt. 16; Foster v. Merchant, 1 Vern. 262; Knipe v. Palmer, 2 Wils. 130. Vide *supra*, 15.‖

9. *Of Leases made by a Guardian.*

A guardian in socage may make leases for years in his own name, and the lessee may maintain ejectment thereupon; for this guardian is a person appointed, not by any special designation of the party, but by the wisdom of the law, in respect of the lands descended to the infant; so that where no lands descend, there can be no such guardian: and his office originally was to instruct the ward in the arts of tillage and husbandry, that when he came of age he might be the better able to perform those services to his lord, whereby he held his own land. And though the office now be in some measure changed, as the nature of the tenure itself is, since the time that the socage tenants bought off their personal labours and services with an annual rent to the lord; yet it is still called socage tenure, and the guardian in socage is still only where lands of that kind (as most of the lands in England now are) descend to the heir within age. And though the heir after fourteen may choose his own guardian, who shall continue till he is twenty-one; yet, as well the guardian before fourteen, as he whom the infant shall think fit to choose after fourteen, are both of the same nature, and have the same office and employment assigned to them by the law, without any intervention or direction of the infant himself; for they were therefore appointed, because the infant, in regard of his minority, was supposed incapable of managing himself and his estate, and, consequently, derive their authority, not from the infant, but from the law; and that is the reason they transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do, if their authority were derived from him. And if their authority were derived from him, it would by no means answer the intention of the law in appointing them; for then all acts done by virtue of such derivative authority could be of no more force than if done by the person himself who gave that authority, since none can communicate more power to another than he has himself; and that would invalidate all their contracts, and make them savour of the same imbecility as if made by the infant himself. Therefore, to enable them to take effectual care of the infant and his affairs, the law has invested them, not with *a bare authority* only, but also with *an interest*, till the guardianship ceases; and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit; and therefore their authority and interest extends only to such things as may be for the benefit and advantage of the infant, and whereof they may give an account; which is the reason they cannot present to any benefice in right of the heir, because they can make no advantage thereof, (for that would be simony,) and, consequently, have nothing therein whereof they can give an account; and therefore the infant himself shall present thereto.

Lit. § 123, 124; Co. Lit. 88, 89; Vaugh. 18; {5 John. Rep. 66, Byrne v. Van Hœsen.} Vide tit. *Guardian.*

From what has been said it appears, that a guardian in socage hath not

only *a bare authority*, but *an interest* in the lands descended, and therefore, during that time, may make leases for years in his own name, as any other who hath an interest in lands may do; for he is *quasi dominus pro tempore*. And if he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him, if he thinks fit: for they were not derived barely out of the interest of the guardian, or to be measured thereby, but take effect also by virtue of his authority, which, for the time, was general and absolute; and therefore all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself, by which they were done, is determined; and consequently, the infant, when he comes of age, may by acceptance of rent or other act, if he thinks fit, make such leases good and unavoidable. But a guardian by (*a*) nurture cannot make any leases for years, either in his own name, or in the name of the infant, for he hath only the care of the person and education of the infant, and hath nothing to do with the lands merely in virtue of his office; for such guardian may be, though the infant hath no lands at all, which a guardian in socage cannot.

Supra, vol. iv., p. 555; Bro. tit. *Garden*, 19, 70; Cro. Ja. 55, 98; Shopland v. Ridler, 2 Roll. Abr. 41, Brisden v. Hussey. ‖ If a lease be made by the guardian, and the ward under fourteen years of age, it is the lease of the guardian, and not of the ward; but after fourteen, it is the lease of the ward, and not of the guardian. Dugar v. Norton, 1 Freem. 102.‖ (*a*) But *note*, a testamentary guardian, or one appointed pursuant to the statute 12 Car. c. 24, is the same in office and interest with a guardian in socage. Vaugh. 179;‖ 2 Wils. 129. But though a testamentary guardian shall have the custody of the infant's real estate, a lease granted by him of that estate is absolutely void. Roe v. Hodgson, 2 Wils. 129, 135.‖

A lets land to B for four years, and the lands being holden in socage, and the heir under fourteen, the guardian in socage by an indenture, before the first lease was expired, lets the same lands in his own name to B for eight years; and if by this acceptance of a new lease from the guardian in socage the first lease was surrendered, was the question? and it is said to be holden by the court, that it was surrendered; or, if it could not be properly called a surrender, for want of a reversion in the guardian in socage, yet they held, that at least the first lease was thereby determined by admittance of the lessor's power to make such present lease, which, if the first should stand in the way, he could not do; and a guardian in socage hath power to make leases for years. Though this case is cited in (*b*) Hutton to be no surrender, yet it was in a case, where the question was of a surrender strictly and properly so called; and therefore, though it were not to be cited for an authority of a surrender properly so called, yet it might amount to a determination of the first lease, which, in the principal case, all the court agreed that it did: but they held, it would be otherwise in case of such lease made by a guardian *pur nurture*, for he can only make leases at will; and therefore such second lease at will must be absolutely void, when the lessee was in possession already by virtue of a lease for years.

Leon. 158, 322; 4 Leon. 7; Owen, 45, 56, Willis v. Whitewood. (*b*) Hutton, 105.

If a woman, who is guardian in socage to her son, marries again, and the husband and she join in a lease of the infant's lands, this lease, upon the death of the husband, becomes void; for the interest which she had in the lands was in right of the infant, and therefore shall not bind her, as those acts shall in which she joins with her husband in parting with her own possessions.

Plowd. 293, Osborne's case.

(I) Leases by those who have but a particular Estate, &c.

β A lease made by the guardian of an infant under the age of fourteen years, for a term of years extending beyond the arrival of the infant at that age, is voidable, and may be avoided by another guardian chosen by the infant after he attains the age of fourteen.

Snook v. Sutton, 5 Hals. 133.

In Connecticut, the conservator of an idiot is not empowered, by virtue of his office, to make a lease of such idiot's real estate, the statute having given this power exclusively to the county court.

Treat v. Peck, 5 Conn. 280.

A lease of the lands of an infant by his father, as natural guardian, is void.

May v. Calder, 2 Mass. 55.γ

10. *Of Leases made pursuant to Authority.*

If one hath power, by virtue of a letter of attorney, to make leases for years generally by indenture, the attorney ought to make them in the name and style of his master, and not in his own name: for the letter of attorney gives him no interest or estate in the lands but only an authority to supply the absence of his master by standing in his stead, which he can no otherwise do than by using his name, and making them just in the same manner and style as his master would do if he were present: for if he should make them in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose; yet such leases seem to be void, because the indenture being made in his name, must pass the interest and lease from him, or it can pass it from nobody: it cannot pass it from the master immediately, because he is no party; and it cannot pass it from the attorney at all, because he has nothing in the lands; and then his adding by *virtue of the letter of attorney* will not help it, because that letter of attorney made over no estate or interest in the land to him, and, consequently, he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the master immediately, or through the attorney; for then the same indenture must have this strange effect at one and the same instant, to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do; and therefore all such leases made in that manner seem to be absolutely void, and not good, even by estoppel, against the attorney, because they pretend to be made not in his own name absolutely, but in the name of another, by virtue of an authority which is not pursued. This case therefore of making leases by a letter of attorney, seems to differ from that of a surrender of a copyhold, or of livery of seisin of a freehold, by letter of attorney; for in those cases when they say, *We A and B as attorneys of C, or by virtue of a letter of attorney from C, of such a date*, &c., *do surrender*, &c., *or deliver to you seisin of such lands;* these are good in this manner, because they are only ministerial ceremonies or transitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig; and when they do them as attorneys, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly; but in a lease for years it is quite otherwise, for the indenture, or deed alone, convey the interest, and are the very essence of the lease, both as to the passing it out of the lessor at first, and its subsistence in the lessee afterwards; the very indenture, or deed itself, is the conveyance, without any

subsequent construction or operation of law thereupon; and therefore it must be made in the name and style of him who has such interest to convey, and not in the name of the attorney, who has nothing therein. But in the conclusion of such lease it is proper to say, *In witness whereof A B of such a place*, &c., *in pursuance of a letter of attorney hereunto annexed, bearing date such a day;* or if the letter of attorney be general, and concern more lands than those comprised in the present lease, then to say, *In pursuance of a letter of attorney, bearing date such a day*, &c., *a true copy whereof is hereunto annexed, hath put the hand and seal of the master*, and so write the master's name, and deliver it as the act and deed of the master; (*a*) in which last ceremony of delivering it in the name of the master by such attorney, this exactly agrees with the ceremony of surrendering by the rod, or making livery by a turf or twig, by the attorney, in the name or as attorney of his master; which proves that there is a great diversity between using the name of the attorney in the making of leases, and using his name in making a surrender of copyhold, or livery of seisin of a freehold estate.

Roll. Abr. 330; 9 Co. 76 b, 77; Cro. Eliz. 115; Moore, pl. 1106, Frontin v. Small; 2 Str. 705; 2 Ld. Raym. 1418, S. C. White v. Cuyler; 6 T. R. 177; 9 Co. 76, 77, Combe's case. (*a*) ‖ It is immaterial whether the attorney place his own name first or last, provided the deed be executed in the name of the principal. Therefore, an execution thus "for A B, (the principal,) C D, (the attorney,) L. S." is good. Wilks v. Back, 2 East, 142.‖ ☞ See as to the manner of executing an authority, antè, tit. *Authority*, vol. i. page 525.☜

The king, by letters patent, gave authority to his surveyor to make such leases of such lands, reserving the ancient rent, and the surveyor makes leases by indenture between the king *ex unâ parte*, and J S, *ex alterâ parte*, and the indenture *testatur quod dominus rex dimisit*, &c., and the conclusion was, *in cujus rei testimonium* the surveyor *sigillum suum apposuit:* the court held these leases to be void, because not pursuant to his authority; for a bailiff cannot make leases in his own name, though it be but *de anno in annum*, and of lands usually let, but he ought to make them in the name of his master; so here the surveyor ought not to have put his own seal to the lease, but the seal of the king, for without the king's seal it cannot be his lease; and the manner of pleading such lease proves this, for the words are, *quod dominus rex per A B sigillum suum apposuit;* and a great case was cited, where such lease by a bailiff, in his own name, was held to be void.

Moore, pl. 191; Dyer, 132.

In ejectment the case was, that one A devised lands to B, his son in tail, with divers remainders over, and makes one C overseer of his will, and willed that he should have the education of his son till he came to the age of twenty-one, and to receive, set, and let for the said B; the said lands so given him, and thereof to account to the said B, being allowed his charges, &c. C makes a lease for seven years in his own name with reservation of rent to himself; and this lease, by computation, was to continue half a year after B's attaining his full age; and if this lease was good for any part of the term, was the question, C being dead, and B not yet of age? and it was argued to be good for the whole term, or at least during the minority of the son, and only void for so much as exceeded the full age of the son, and that C had an interest in the land, and not a bare authority only; for then all leases must have been made in the name of the infant, and so he might

avoid them whenever he thought fit, which the testator never intended to empower him to do. But Popham, Clench, and Fenner held that, as this devise is, C was but a guardian for nurture, and could not make leases at his own will and pleasure; for then he might make them for one hundred years; but here he can only make leases at will, for there is no other time certain appointed, and he is but in the nature of a bailiff, and accountable; and therefore it was adjudged that the lease was void. From this case it appears, that if the authority had been sufficient to enable him to have made leases for years, such leases made by him during the continuance of that authority would not have determined therewith, but should have subsisted during the whole term for which they were made; and the infant in such case could not, when he came of age, have avoided them, as he may leases made by his guardian in socage, if he thinks fit, because the lessee would have been in by the will and devise, not by the guardian *pur nurture*, admitting the authority or devise had been sufficient for that purpose, which in none of the following cases of devises it seems to be.

Cro. Eliz. 678, 734, Piggot v. Garnish.

One devises land to his son when he comes to the age of twenty-four years, and in the mean time that his executor shall have the oversight and dealing of all his lands and goods: this gives the executor no interest to make a lease certain for years, but only an authority to oversee and order the land in right of the son, and for his use and benefit, as wanting discretion to manage it himself; but the whole estate remains in the mean time in the son by descent, and the executor can only make leases at will; for there is no express devise to him of the lands till the son comes to twenty-four, nor any express authority to make leases for years in the mean time; and the heir shall not be disinherited, though but for a time, without a manifest intent in the will to that purpose. And where in that case, the son died before he came to twenty-four years of age, it was held, that whether the devise gave the executor an interest or an authority only, yet it determined by the death of the son, whenever that happened; for it was only affixed to his care of the son, and, consequently, determined by his death, and was never intended to exclude the next heir till the son should or might have attained his age of twenty-four years; and then the executor having power to make leases at will only, the next heir may, whenever he thinks fit, determine them by entry, or otherwise.

Moore, 774; Yelv. 73, Carpenter v. Collins; Dyer, 26 b.

But, if the words of the will had been that the executor should have the land, or the profits of the land, to his own use, without account, till the son should come to twenty-four, provided, or to the intent that he should bring up and educate his child or children; this would not only amount to a trust and confidence in the executor, but would also fix such an interest in him for answering the purposes of the will, as would go to his executors, though he should die before the son attained the age of twenty-four years; and the education of the child, or children, is no such matter of privity or confidence, but that another may do it as well; and, consequently, in this case, such executor may make leases for years, till the son should or might attain to the age of twenty-four years; and this would not determine, though the son should die before that age, till by computation of time he might have attained that age, if he had lived.

Cro. Eliz. 190, Parker v. Plummer; Cro. Eliz. 252, Smith v. Havens; Hob.

(I) Leases by those who have but a particular Estate.

285, Balder v. Blackbourn; Dyer, 210, pl. 24. {See 2 Day, 338, Everts v. Chitten don; 6 Ves. J. 147, *Ex parte* Davies.}

One devised lands to his wife *de anno in annum*, till his son should come to the age of twenty-one years: this was by all the justices held such an interest as would determine by the death of the son, though before twenty-one; for the intent was only that his wife should have the lands during the minority of the son, by reason of his supposed incapacity to manage them during that time, which reason is at an end by his death: and this the rather appears to be his intent by the words *de anno in annum*, which are executory and applicable to each single year, and show his caution, not to give it to his wife for any determinate number of years, lest his son should die in the mean time, whose death, or attainment of twenty-one years, he intended should be the determination of the wife's interest. But, by Dyer, it would have been otherwise, if the words had been, till the son should or might come to that age. And therefore this case differs from Boraston's case, and the other cases, which were adjudged, upon a special reason, that for payment of debts, or for the support and provision of the devisee or executrix, or for maintenance of his children generally, where he had several; there in such cases, though the son to whom it was devised at such an age should die before that age, yet the executrix, or devisee, should have such an interest vested in them for those purposes, as should not determine till the son should or might have attained that age, if he had lived; and, consequently, such executrix, or devisee may make lease for years, which shall continue as long as their own interest therein.

Moore, pl. 143; 3 Co. 19, 20; Boraston's case; Ch. Ca. 114; 2 Ch. Rep. 136.

β The trustees of a town, *by resolutions of the board*, granted to A, his heirs and assigns, the rights and privileges of certain real estate, for the purpose of opening a canal, or building a mill of public utility thereon, annexing to the grant a condition, that the improvements should be made within a certain time. For these privileges, A was to pay a certain per centum on the proceeds of the improvements. A assigned his interest to B. The legislature of the late territory of Indiana, afterwards, on the petition of B and of some of the trustees individually, passed an act vesting the fee-simple in B, subject to the condition in the resolutions. B occupied the premises; erected thereon an expensive mill; and, on the demand of the trustess, paid them the per centum on the proceeds of the improvements. The lessee of the trustees then brought an action of ejectment against B. Held, that it is generally necessary in ejectment, for the plaintiff to show a right of possession in his lessor at the date of the demise, and at the time the action was commenced. Held, also, that the legal effect of the resolutions of the board was not affected by the territorial statute, passed on the petition of B, and of some of the trustees individually; the petition being of no consequence, and the legislature having no power to transfer, at pleasure, an estate not belonging to the territory. Held, also, that by their demand and receipt of the per centum on the proceeds of the improvements, the trustees admitted the improvements made, conformably with the condition annexed to the resolutions, and that the moral policy of the law estopped them from contending that their title did not authorize the grant. Held, also, that the resolutions, being neither deeds, nor matters of record of a court of record, cannot operate as a freehold conveyance, either according to the common law, or the statute of uses; that they constitute, (the condition being per-

formed,) a lease for an indeterminate period, with a reservation of rent; and that the relation of landlord and tenant, which they create, prevents the occupant under them from disputing the title of the trustees. Held, also, that the interest granted to A would formerly have been a tenancy at will, which his assignment would have determined; but that the old tenancies at will, being now generally superseded by tenancies from year to year which are assignable, his estate, for no expressed period with a reservation of rent, was a tenancy from year to year, and passed as such to B by the assignment. Held, also, that before the trustees could recover in this action of ejectment, which treats the defendant as a trespasser, it was necessary for them to put an end to the tenancy, by giving to the proper person half a year's notice to quit, at that period of the year when the tenancy commenced.

Jackson, ex dem. Bartholomew, &c. v. Hughes, 1 Blackf. 242.

The governor of Illinois (under the statute) leased the Gallatin County Saline to A. B, being appointed superintendent or agent of the Saline, and finding that A was about becoming insolvent, agreed, without the governor's knowledge, that the lease should be transferred to C, who signed the same, and for some time paid the rent. The original lease stipulated, that in case of a violation of the covenants by the lessee, the lessor should enter upon the demised premises, advertise, and lease them to the highest bidder. Held, that C was not bound by these covenants, and that the superintendent had no right to substitute C for the original lessee. Held, also, that in case the original lessee violated his covenants, the course of the lessor was marked out by the stipulations or covenants in the lease.

Owen et al. v. Bond, 1 Breese, 90.*g*

11. *Of Leases made pursuant to powers in private Conveyances and Settlements.*

As in the settlements of estates in families, it is usual to limit but estates for life to the present takers, to prevent their power of alienation and defeating their issue of the provision intended them by such settlements; and yet it is necessary the land comprised in such settlements should be continued in the occupation and manurance of tenants and farmers, who, being skilled in the arts of husbandry, know best how to improve and manage them to advantage; therefore, to encourage the industry of such farmers, it is become customary to empower the tenants for life to grant leases for a certain time, which otherwise they could not do, having themselves but an uncertain interest determinable on their deaths. It will therefore be necessary to consider these kind of leases, and how far their pursuing or deviating from the several powers whereon they are founded will invalidate them, and how far not; as also upon what sort of settlements such powers may be reserved, and what not.

1 Burr. 120. Vide *ante*, the case of Orby and Lord Mohun, letter (E); [and note, that the rules of law adopted in cases of ecclesiastical leases, and of leases made by tenant in tail under the statute of 32 H. 8, apply equally to leases made by virtue of powers in settlements.] ‖This position is certainly not founded. In several instances those decisions even differ from each other, according to the words of the statutes upon which they severally arose. Sugd. Pow. 565.‖

Tenant for life, upon a settlement made 12 Jac. 1, had power to make leases of all or any of the lands which at any time theretofore have been usually demised or let in possession for three lives, or any number of years determinable on three lives, or for twenty-one years, or under, reserving the

rent thereupon now yielded or paid, or more, so long as the lessees, their executors and assigns should duly pay the rents, and perform the conditions, according to the true meaning of their indentures of lease. The tenant for life makes a lease of several parts of those lands, for years determinable on three lives, so long as the lessees, their executors and assigns, duly pay the rents, &c., (*verbatim* as in the power,) reserving the same rents which were reserved 12 Jac. 1, when the settlement was made, and specifying particularly what those rents were; and there being other lands, called Lofield, which were found not to have been in lease since 12 Eliz., (when they were let for twenty-one years, at 100*l.* *per ann.* rent,) he now leases those lands for twenty-one years, rendering 100*l.* *per ann.* rent, and with the same clause as in the other, viz., so long as the lessees, their executors and assigns, duly pay, &c. The rents due at Mich. for the lands in the first lease were found to be in arrear, but paid in a month after; and the rent upon the lease of Lofield was duly tendered, but not received; and before the next rent-day the defendant, as heir at law in remainder, entered, upon whom the lessees re-entered to maintain their leases, &c. 1. It was agreed, that the limitation in the several leases, so long as the lessees, their executors and assigns duly pay, &c., was well warranted by the power being *in terminis* the same with the power, and therefore was good. 2. That by non-payment of the rent at the days, the leases were determined, so that no acceptance after could save or set them up again. 3. It seemed to be agreed that the first lease was good, because expressly found, that the rents reserved were the same as were reserved 12 Jac. 1, and that necessarily implies that those lands were then in lease, and being ancient lands, they shall be presumed to have been usually demised; and the rather, because no doubt was made of this at the trial. But 4. It was adjudged that the lease of Lofield was not warranted by the power; 1. Because the qualifications annexed to the power of leasing show, that land not so qualified was not to be leased: now the land to be leased by virtue of this power was such as had been actually let, which must be twice at least; but Lofield appears to have been let but once; therefore not within the power. Also, *usually* may signify the common continuance of land in lease; as land leased for 500 years long since is land usually demised, though it were demised but once; but then the words, *at any time*, show that it must be of lands which had been usually at all times let, which Lofield was not, being out of lease for above twenty years before the settlement. But chiefly and lastly this lease was adjudged void, because the power was to make leases, reserving the rent thereupon now yielded or paid, viz., at the time of the settlement; and this land not having been leased for twenty years before, could be under no reservation of rent at that time, and, by consequence, the rent thereupon then reserved (which was none) could not be reserved upon any after-lease so to be made: and the words *or more*) will not hold, because they are words of relation, and must refer to some rent before, which here was none at all. Besides, *more* or *less* are words of comparison, and comparatives necessarily suppose a positive; but nothing or no rent is a mere privative. And yet the objection against this construction seems considerable; for it was said, that the words (*at any time heretofore usually demised*) imply that some lands were not then in lease; therefore the clause of reserving the rents, which were then yielded and paid, must extend only to the rent of such lands as were then in lease, and not of the others, which were not then in lease; yet since he had a power of leasing them, if they had been at any time theretofore usually demised,

he might lease them, reserving what rent he pleased; and so is one (*a*) book express in point as to the reservation. But the difference between that case and this is, that there the power was to let all or any the lands generally, without any restraint; whereas this is restrained to lands *usually* letten, which, as appears afore, this of Lofield was not, having been let but once; and therefore the very power of leasing fails as to that; otherwise the reservation of a rent, though none was reserved before, seems no great objection against the lease: *ideo quære?*

Vaugh. 28 to 35; 2 Jon. 27 to 37, Tristram v. Viscountess Baltinglass; 2 Jon. 31.
(*a*) 2 Roll. Abr. 262, Cumberford's case.

{A power of leasing for one, two, or three lives, or for any term of years, determinable on one, two, or three lives, *such lands as were then demised for any such term*, does not extend to lands then held under a demise "to W and G for 99 years, if W and his widow and any eldest son living or *in ventre sa mere* at the time of his (W's) death, or if no son any eldest daughter then living or *in ventre sa mere*, or any or either of those three, viz. of the said W, his wife, son, or daughter, should so long live, remainder to the said G and his widow, son, or daughter, in the same manner." That lease was not determinable on one, two, or three lives; for when one of the persons died, another was to spring up in his room; so that there might have been twelve lives on which the lease was to determine. Under such a power, the lives must be certain and co-existing.

7 Term, 713, Doe v. Halcombe.}

A settlement was made to the use of A for life with remainders over, provided that the tenant for life may make leases of the premises, or any part thereof, so as upon every lease there be reserved 5*s*. an acre for every acre of the land or premises so demised: the tenant for life leases a rectory, (which was not included within the settlement, and consisted only of tithes, without any glebe,) reserving rent, or without any rent at all reserved; and if this were a good lease within this power was the question? It was argued not, because construction is to be made upon the whole clause, and the latter words, which appoint the reservation of 5*s*. rent for every acre of land, shall restrain the general import of the word *premises* to land only, which can only consist of acres; otherwise it may as well be said, where a power is to make leases, so as the ancient rent be reserved, that you may, by virtue of this power, lease lands which were never before demised, and that the words *ancient rent* shall only be applied to the lands which had been anciently or usually demised. But it was answered and resolved by the court, that this lease was within the power, and so would a lease of land, not usually demised, in the case before put; for the power being general and affirmative at first to make leases of all or any part, the restraint which comes after under the *so as*, &c., shall be extended no farther than the very words themselves import, that is, in the one case, to so much an acre for that which consists of acres, and in the other, to the ancient rent for that which was anciently or usually demised. And this resolution was founded chiefly on Cumberford's case, where the power was to make leases of all or any part, so as such rent, or more, were reserved upon every lease as was reserved within the space of two years before; and a lease was made of part of these lands which had not been demised within two years before; and it was resolved to be a good lease, and that he might reserve any rent he pleased, because the power was general to lease all; and therefore the

restrictive clause should be applied only to such lands as had been demised within two years before: but Hale, in the principal case, said, if it had been *res integra*, he might perhaps be of another opinion. *Note* also, this case seems against the case of Vaugh. 28, before.

Vent. 294; 2 Lev. 150; 3 Keb. 544, 547; Walker v. Wakeman, 2 Roll. Abr. 262.

[Lord Ferrers was tenant for life under a settlement, in which there was the following power, viz. "That it should be lawful for the tenants for life respectively, from time to time, and at all times during their respective natural lives, and when they shall respectively come into, and be in, *the actual possession of the aforesaid manors and premises*, by virtue of the limitations aforesaid, by indentures under their hands and seals, to demise all or any of the said manors, messuages, lands, tenements, and hereditaments hereinbefore mentioned, or any part thereof, to any person or persons whomsoever, in possession, but not by way of reversion or future interest, for the term of 21 years absolute, or any less absolute term; or for any term or number of years determinable upon one, two, or three lives, so as upon every such lease or leases respectively there be reserved and made payable during the continuance of such lease or leases respectively, to be incident to, and go along with the immediate reversion or remainder of the premises so leased, so much or as great yearly rents as, or more than now is, and are paid and yielded, or agreed to be paid and yielded for the same, or proportionably for any part thereof." Lord Ferrers, under this power, granted a lease to the defendant for 99 years, if she should so long live. Part of the premises comprised in the lease consisted of manors and manerial rights which had never been leased before, and also of a fishery which had been let before, but was not at the time of the settlement. Since that time, it had been let again at 15*s*. It was objected, that the manors and fishery were not demisable under the power. The manors had never been let; the fishery was not let at the time of the settlement; and the power required the rent then paid, or *more*, to be reserved. Things then for which *no* rent was *then* paid, could not be meant to be comprehended. This would avoid the whole lease; for one entire rent was reserved, and it could not be apportioned. But, by the court, the power is express to demise the manors and fishery. They are particularly mentioned in the settlement, and the power goes to the whole. They pay under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then. The words therefore are complied with, and this objection could only stand upon *intent*. But no such *intent* appears. The manors are nominal,—of no value,—no object of yearly income—the fishery worth only 15*s*. a year. They are convenient to the lessee living on the land, and of no use to the remainder-man. The intent was to give leave to demise all, reserving as much rent in the whole as had been reserved before. Besides, the words at the end of the power, "or proportionably for any part thereof," show that it was the intent that the *quantum* of the rent, and not any particular part of the premises included in the settlement, was to guide the person in executing the power.

Goodtitle v. Funucan, Dougl. 565; 3 T. R. 677.

A, tenant for life under a settlement, in which there was a power, that any person who should be actually seised of the lands by virtue of the settlement might make a lease or leases for three lives, or for 21 years, of all or any part of the premises therein comprised, *at such yearly rents, or*

more, as the same were then let at, granted a lease of the capital messuage for twenty-one years, but reserved no rent. The question was, whether the capital messuage was demisable under this power, and the court held that it was not. For, as Lord Mansfield, noticing and approving (*a*) this case observed the qualification annexed to the power of leasing, that *the ancient rent must be reserved*, manifestly excludes the mansion-house, and grounds about it, *never let*. No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion-house; therefore, the words in such a case show, that the power was meant to extend only to what had been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant for life. He has the occupation of what was always occupied, and the rent of what was always let. The nature of the thing spoke the intent as forcibly as the most direct words would have done. It was demonstration.

Bagot v. Oughton, 8 Mod. 249; Fortesc. 332, S. C. || The judgment in this case is commonly said to have been affirmed in the House of Lords; but there is no trace of it any where to be found.|| (*a*) Dougl. 574.

|| Serjeant Maynard by his will devised several manors, messuages, &c., to trustees, and (*inter al.*) the manor of Beer in the county of Devon, to the use of his grandchild, Mary Maynard,(since countess of Stamford) for life, with remainder to Lady Hobart for life, with remainder to her first son, &c., with remainder over. In the will there was a power in the words following, viz. My will is, that my grandchild Mary Maynard, when she by virtue of any clause in this my will, or the meaning thereof, shall be or ought to be in the possession of the manor of Beer, and afterwards every son of her, or their sons being in possession thereof, and of the age of twenty-one years, and entitled to the said manor of Beer, be empowered and may lease all or any of the tenements thereof for one, two, three, or four lives, or years so determinable, in possession, reversion, remainder or expectancy, and under the new rents now reserved, and the like agreements and covenants as in the leases now in being, and by the present tenants thereof respectively to be performed and kept, so as all leases to be made with other estates then formerly leased, then in being, exceed not four lives [and be] determinable by death of four persons at most in one tenement at one time. Then follows this clause; *Item*, my will is, that T G and every other agent in his place appointed as is hereinafter mentioned, and every other person to whom the premises shall come into possession, may then lease the same or any part thereof at rack or at most reasonable rent, and such other agreements for reparations and against waste, as they can reasonably agree upon, such leases not to exceed the term of seven years. This power was afterwards confirmed by a private act of parliament of 5 & 6 W. & M. which recites the will verbatim, and confirms it, and likewise creates a term of 1000 years to raise money to pay off encumbrances. Afterwards by decree in the Court of Chancery affirmed in Dom. Proc. in a cause wherein Sir John Hobart (then an infant) was plaintiff, a settlement was directed to be made pursuant to the will, and a settlement was made by the trustees, but there was a small variance in the words of the power of leasing in the settlement from those in the will, viz., instead of the words (*under the new rents now reserved*, &c.,) as in the will the settlement was (*so as the rents new reserved*, &c.,) and the restriction comes under the words *so as*, &c. The plaintiff claimed, under a lease for three lives by the Countess of Stamford for a valuable con-

sideration by virtue of this power, the barton of Beer, part of the manor of Beer, which was out upon a lease for lives at the time of Serjeant Maynard's purchase, but the lives happened to drop before he made his will, and it was in hand at the time of his death. The plaintiff filed a bill to be relieved against a recovery in ejectment by defendant Mariot to whom the term of 1000 years was assigned, for securing a sum of money lent by him to the trustees, and that the plaintiff might redeem the mortgage, or that the mortgage-term should not be set up against him at law to defeat his lease, but that he might be at liberty to try the validity of his lease at law against the remainder-man, Sir John Hobart. The bill was dismissed at the Rolls for defect of title in the plaintiff, his honour being of opinion, that the lease was not warranted by the power, and therefore determined with the estate for the life of the lessor. From this decree there was an appeal to the Lord Chancellor King, who was pleased to call to his assistance Raymond, C. J., Denton, J., and Comyns, B. After hearing the arguments of counsel on both sides, Lord Raymond declared that he and his brothers were all of opinion, that the lease made to plaintiff was not warranted by the power. It is very difficult, he said, to make a difference in reason between the power in the settlement, and the power in the will; the words may vary, but the sense is the same. This power is in prejudice of the remainder-man, and increases the interest of the tenant for life, and therefore to be construed strictly. But, supposing there be a difference, I think this power ought to be taken upon the foot of the will, and not upon the settlement; the power in the will is all one clause, and must be construed together; and the case of Tristam v. Viscountess Baltinglass is a case in point; so is the case of Bagot v. Oughton, according to the opinion of B. R., to whom the case was referred by Cowper, C. The settlement recites the will, the act of parliament, and the decree, and if the deed does make any difference, it must be contrary to the will, act of parliament, and the decree. But it was said, the defendant, Sir John Hobart, does admit the settlement by his answer, and therefore is concluded by it; but that sounds harsh in a court of equity; and where the whole state of the case appears upon the record, the admission of the party is not an estoppel at law. As to Cumberford's case, which had been relied upon by the plaintiff's counsel, Hale, C. J., said, if it had been *res integra*, he should have been of another opinion. The judgment in Walker v. Wakeman is not founded upon the authority of Cumberford's case. So, in the case of Winter v. Loveday, Cumberford's case is cited, but no great stress laid upon it. But, if that case be law, it should not be carried one step further.

Foot v. Marriott, Vin., Abr. tit. *Authority*, (G. p. 9;) Sir J. Hobart v. Earl of Stamford, 3 Br. P. C. 81; Vaugh. 28, *supra*, 575; 8 Mod. 249; 2 Lev. 150; 5 Mod. 378.

King, C. It does not appear to the court, that the plaintiff has any title, and therefore it is not proper for the court to remove the mortgage out of the way, to enable him to try the validity of his lease at law. Equity will not set up the settlement in opposition to the will. I think there is no material difference between the power in the will and the power in the settlement; the sense is the same. The word "tenement" in the will, in legal understanding, has a general signification; but in common understanding means lands holden by tenants; and this appears to be the meaning of the testator by the subsequent power to demise the premises for seven years at a rack-rent. Vaughan, 28, is a case in point; and since the court is of opinion that the lease is not good, it is not proper for the court to interfere in favour

of the plaintiff to set this mortgage out of the way, in order to trouble the remainder-man with a suit at law. Therefore the decree of dismission at the Rolls must be affirmed.‖

[Where a tenant for life under a will, with a power to let *all* or *any* part of the premises, *so as the usual rents* be reserved; and so as there should not be at any one time any greater or larger estate upon any one *tenement*, or part of a tenement so leased, than for three lives, or for ninety-nine years, determinable on lives, either in possession or reversion; and so as such lease or leases should not be made dispunishable of waste; granted a lease *of tithes which were never leased before the making of the will;* the court held that such lease was not warranted by the power, and therefore void. It was most manifestly the intent of the devisor, that nothing should be let, but what had been let before; that those who were to enjoy the estate after him, were to enjoy it in the same manner as he had done. In all cases on the construction of powers, the single point to be considered is, the intention of the creator of the power: that alone must govern.]

Pomery v. Partington, 3 T. R. 663. [1 Burr. 120.]

‖So, where a testator devised his lands to trustees and their heirs, in trust to the use of A for life, with several remainders over in strict settlement; and gave a power to the trustees, and the survivor of them, and the heirs and assigns of such survivor, from time to time during the minorities of the persons to take under the will, and afterwards to any tenant for life under the limitations aforesaid, to grant leases of all or any part of the premises, for not exceeding three lives in possession or reversion, so as upon such lease or leases there be reserved the ancient or accustomed yearly rent or rents, heriot and heriots, and other things usually paid for the same premises; the court said, that as in Bagot v. Oughton, the nature of the property proved the intention, so in this case, they thought the intention as plainly proved by the character of some of the parties to whom the power is given. It was to the trustees that the power in the first instance was given, and they thought it never could have been intended, that they, who might have had an interest for a day only, and who were not intended to have a beneficial interest, should be able to alter the nature of the property, and prevent the tenant for life from occupying what the testator had always reserved for his own occupation. The necessary purposes, therefore, of the power would be fully satisfied by suffering the trustees and the tenant for life to let what had been before let.

Doe v. Rendle, 3 M. & S. 99.‖

If land hath been leased, by virtue of a contract, from year to year, for three years, this cannot be said to be usually let, because this is but one lease, though renewable every year. (*a*)

Roll. Abr. 262. (*a*) ‖ Lord C. J. Vaughan, upon citing this case of a single demise (Vaugh. 28), said, that he did not much insist upon it, for the words "*usually* demised" may be taken in two senses; the one, for the often farming, or repeated acts of leasing lands; the other, for the common continuance of lands in lease; for that is usually demised; and so, land leased for five hundred years long since, is land usually demised, that is, in lease, though it have not been more than once demised, which is the more received sense of the words, land *usually demised*. Indeed, says Mr. Sugden, the common sense of mankind must revolt at a distinction, which considers lands leased for one hundred years as not usually demised, because the term was granted by one deed; but allows land which has been let for two years only, upon two distinct lettings, to come within that description. Sugd. Pow. 568.‖

[Lands were conveyed on a marriage to trustees and their heirs, to the

use of one for life, remainder to his first and every other son in tail-male, &c., with a proviso, "that it should be lawful for the tenant for life, and his wife, during their respective lives, and the son and sons of their respective bodies, and the heirs male of such son and sons, and the heirs male of tenant for life, as they should be severally and successively in possession of the freehold by virtue of the limitations aforesaid; and for the said trustees, and the survivors and survivor of them, and the heirs of such survivor, *during the minority* of any such son or sons, or issue male, at any time or times, by any deed or deeds to be signed and sealed by him or them respectively, in the presence of two or more credible witnesses, to demise, lease, &c., to any person, &c., either in possession or reversion for one life, or for two or three lives, &c., all or any part of the premises which *had been usually so demised and letten*, so as there should be no more than three lives in being at one time," &c. A lease was afterwards made by indenture, &c., bearing date the 24th of June, 1742, between the trustees named in the settlement, (there being then a minority,) and J S, of part of the premises, in consideration of a fine paid, a certain yearly rent, and a specific sum for a heriot. Several old leases of the premises were shown, some in Queen Elizabeth's time, and others in that of Henry 8th; some for years, and others for ninety-nine years, determinable upon three lives: and among the rest, an indenture *tripartite* bearing date the 15th of December, 1638, whereby one of the ancestors of the present tenant for life, seised in fee, in consideration of natural love and fatherly affection to his second son, and for his better advancement, livelihood, and maintenance, covenanted to stand seised to the use of himself for life, then of his second son, his executors, &c., for ninety-nine years, if his said son, or any woman he should marry, or any issue of his body, should so long live, paying unto the heirs and assigns of the father the yearly rent of 4*l.* payable quarterly; with covenants on the part of the son to pay the rent, and repair the premises. The question was, whether a covenant to stand seised could be considered as an evidence of the usual manner of demising? And by the court, it should. There is no doubt, but that these lands had been usually leased for lives; and the usual profits made by fines. A covenant to stand seised entered into by the owner of an estate, is *a lease:* and the objection, that the covenant to stand seised in question is by way of provision for a younger child, is of no weight; for it is every day's experience; nothing being so common as the making of these leases for the benefit of younger children.
Right v. Thomas, 3 Burr. 1441; 1 Bl. Rep. 446.]

‖But, a power to lease for one, two, or three lives, or for any term of years determinable upon one, two, or three lives, such parts of the estate as were then demised "for any such time," was considered as extending only to leases, such as are usual where all the lives are certain and co-existing; and not including lands which had been demised in the nature of a family settlement in the following manner, viz. for the term of ninety-nine years, if A, (the son of the lessor,) or any woman he should marry, or who should be his wife at the time of his decease, and any son of his body, lawfully begotten, or to be begotten, which should be his eldest son living, or *in ventre sa mere* at the time of his decease; or, if at any time he had no son born, nor *in ventre sa mere*, then, if any, his eldest daughter should be then living, or *in ventre sa mere*, or any, or either of those three, viz. of the said A and such his wife and son, if any, or daughter, if no son at the time of his decease, should so long live, remainder to B (another son of the lessor)

for the term of ninety-nine years, (in the same manner,) yielding and paying during the said term the yearly rent of twenty shillings, with a proviso, that the lessor might revoke the said term during his life.

Doe v. Halcombe, 7 T. R. 713.‖

If a feoffment in fee be made to the use of A for life, remainder to B in tail, with power for A to make leases reserving, or so that he reserves the accustomable rent, payable to all those who shall have the reversion or remainder; if A make leases accordingly, these leases derive their essence out of the feoffment, and after they are made do, in point of time, precede all the other estate limited by that feoffment; so that the rent thereupon reserved shall go, with the reversion or remainders thereby limited, as a rent properly so called, and not as a sum in gross; and therefore those in reversion or remainder may distrain, or have an action of debt for recovery of it, as if they were seised in fee, and had made such lease. And where one book (*a*) calls it a sum in gross, this is denied to be law in (*b*) another, and several books prove it a rent. But in Poph. (*c*) it is said to have been a doubt, in the Lord Dyer's time, if such leases should be good, unless there were a clause, that the feoffees, and their heirs, should stand seised to the use of such lessees; for which reason it may not perhaps still be amiss to insert such a clause, though such leases have ever since been held to be good without such clause; for since the same deed that limits the estates to A and B gives A power to make leases for such a determinate time, these leases cannot be derived out of the interest of A, for that being but for his own life, is not commensurate to such leases, which at all events are to last for such a time; and if such leases were to determine at A's death, the power would be nugatory and idle, because without it he might have made such leases; but the power being to make leases which shall endure longer than the life of A, these leases, when they are made, must be derived out of the same root as the estate of A himself is, that is, out of the estate of the feoffees, who for that purpose have a kind of *scintilla juris* left in them to serve such future leases when they are made, and, by consequence, must be seised to the use of such lessees; and then the statute of 27 H. 8, c. 10, presently carries the possession accordingly; and the power, being coeval with the other estates, may well subject them to the execution thereof; since he who is master of his own estate may dispose of it upon what terms he thinks fit.

Co. 134 a, 139; Poph. 81; 8 Co. 71 a; And. 273, Harcourt v. Poole; 2 Roll. Abr. 261; 2 Jon. 35. (*a*) Co. 139. (*b*) In 2 Jon. 35, for which is cited And. 273; 2 Roll. Abr. 261. (*c*) Poph. 81.

But these leases can only be made by virtue of such powers upon estates executed by transmutation of possession: therefore, if one bargains and sells lands to another by indenture enrolled for the life of the bargainee, with power for the bargainee to make leases for three lives, or 21 years; yet this is of no effect to give him any such power; for here is no transmutation of the possession at law, but only a use raised by virtue of the consideration, to which the statute immediately carries a possession, according to that use; but for the residue of the estate, it continues wholly in the bargainor, as it was before; and then the persons who are to be the lessees being unknown, no consideration can arise from them to the bargainor, and, by consequence, no other use can then be drawn out of him. And if the use does not arise at the time of the bargain and sale, it can never arise after; because when the deed is once perfected, its

operation, as to creating any new or further interest, is then at an end, and consequently, no leases can be made upon such a conveyance, for want of a consideration to raise a use to the lessees.

Poph. 81.

So, if one covenants to stand seised to the use of himself for life, remainder to his wife for life, with divers remainders over, with a power for the covenantor, for divers good causes and considerations, to make leases for lives or years, &c., this power is perfectly void, so that he cannot by virtue thereof make leases, even to his sons or daughters, or any other of his blood, much less to strangers; because such general consideration can raise no use at all, and no averment of a particular consideration can help it, because his intent appears to be general, with regard to the persons to take such leases, as to the consideration whereon they are to be made; for his intent then was not to demise to one person more than to another; and since such leases are to arise and take their effect out of the estate of the covenantor, there must be a consideration to raise a use for that purpose at the time of the covenant made; which in this case there cannot be, *when neither the persons nor the consideration are known:* and if there be no consideration to raise such use at the time of the covenant perfected, it can never arise after, because the further operation of the deed then ceases. But upon a *feoffment, fine*, or *recovery*, where the estate is *executed*, and a change of the possession made presently, there, no consideration is requisite to raise any of the uses; and then, by virtue of the power which is created at the same time with the conveyance itself, the lease may be made at any time after.

Mildmay's case, Co. 176; Moore, 144, 372; 2 Roll. Abr. 260; Cross v. Faustenditch, Cro. Ja. 180; Baynes v. Belson, Raym. 247; 3 Keb. 809; Gilb. Uses, 46.

And yet where one covenanted to stand seised to the use of himself for life, remainder to his eldest son, with power for himself to lease a small part for 40 years, which he accordingly afterwards did, for a provision for a younger child; though at law this was not good, yet the Lord Chancellor Egerton, upon a bill in chancery, decreed relief, because the son claimed by the same conveyance by which the power was limited, and the conveyance was intended to have been by livery, but that the father was advised such covenant to stand seised would do as well; and the law in Mildmay's case was not then adjudged; so that neither the party nor his counsel did then know but that such power was warranted by law.

Ch. Ca. 101, 263, 264; Prince and Green v. Chandler, 40 Eliz.; 3 Ch. Ca. 91. [Lord C. J. Treby, in his argument in Bath and Montague's case, assigns the same reason for supporting the lease.]

A husband seised of lands in right of his wife, he and his wife levy a fine to the use of themselves for their lives, and after to the use of the heirs of the wife: proviso, that it shall and may be lawful to and for the said husband and wife, at any time during their lives, to make leases for 21 years, or three lives; and the wife being covert, made a lease for 21 years: it was adjudged a good lease against the husband, though made when she was a feme covert, and although it was made by her alone, by reason of the proviso. This is the case *verbatim*, as it is put in the book: but surely the reporter must be mistaken; for, as it is put, there appears no power for the wife solely to make leases, but only in conjunction with her husband; therefore the power must be intended for the wife solely, or for the husband and wife, *or either of them;* and then, no doubt, such lease by

the wife alone will bind the husband, because it takes its essence *out of the fine*, to which both were parties and consenting.

Godb. 327, pl. 419.

[One seised in fee, on his marriage with a second wife, settled lands on himself for life, then on his wife for life, then on the issue of that marriage, then to the use of his eldest daughter by his former wife, and to the heirs of her body, &c. There was a proviso, that it should be lawful for the wife, *during her life*, to demise the premises to any person for such term, with and under such conditions, rents, and reservations, in such manner to all intents as tenant in tail may do by statute 32 H. 8, for the term of one, two, or three lives, upon and under such reservations and rents, and in such manner as tenant in tail was enabled to do by that statute. The husband died, and the wife married again, and she and her second husband demised the premises pursuant to the power. Two questions were made; first, whether the lease made by the husband and wife, when the power was given to the wife alone, were a good execution of the power, or whether it were not suspended by the marriage? Secondly, whether this lease by the husband and wife ought not to have been made by fine? As to the first question, the court held, that this was a good execution, notwithstanding the power was to the wife only. As to the second, that no fine was necessary: for the estate of the lessees was not derived from the lessors, but arose out of the estate of the feoffees or releasees named in the original settlement; that therefore, nothing more was requisite to the raising of an estate to the lessee, than what was required by the deed creating the power; which was only an indenture signed by the party making the lease, and made in such manner as the 32 H. 8, requires in leases by tenant in tail.

Bayley v. Warburton, Com. Rep. 494; Burnet v. Mann, 1 Ves. 157.]

A, seised of a reversion in fee expectant upon an estate for life to B, covenants to levy a fine, &c., to the use of himself for life, remainder to the use of himself in tail, &c., with power to A, to make any lease or leases in possession or reversion of all or any the premises, provided that such lease or leases do not exceed three lives at the most, or 21 years, and so as the accustomable rent be reserved, payable during such lease or leases: a fine is levied accordingly: then A makes a lease to C for 99 years, if two lives should so long live, to begin after the death of B, rendering 14*l.* *per annum* (the ancient rent) to him, his heirs and assigns, and to such person and persons to whom the inheritance shall after his death appertain; and if this was a good lease, pursuant to his power, was the question? It was adjudged that it was: because the first part of the power was to make leases absolutely and indefinitely, in possession or reversion, and the restraint which came after was only that they should not exceed three lives, or 21 years, which this lease does not; for though it is for 99 years, yet it is determinable on two lives, which is less. Besides, the power being to make leases as well in reversion as in possession, and for lives as well as years, could not have been executed, as to making leases for lives, in any other manner; (*a*) for they could not be made for lives in reversion, as they may for years determinable on lives; and a lease in such manner was most consonant to the nature of his estate, which was but a reversion after the estate for life to B. But the court agreed, that if one hath power generally to make leases for three lives, he cannot make a lease for 99 years, if three lives so long live; for this is not pursuant to his power,

which was only to make leases for three lives; and there being no other liberty given in the power, he cannot vary from it, because such powers being to charge the inheritance of a third person, are to be taken strictly. 2. It was adjudged, that the reservation was good, because such lease, after it is made, comes in by virtue of the power above all the limitations, and takes its essence, not out of the estate for life, but out of the estate of the conusees before all the other estates, and then they coming in after, in the nature of reversioners, the reservation to them is good.

8 Co. 69, 70; 2 Roll. Abr. 260; Whitlock's case, 3 Mod. 268, 269, Lutwich v. Piggott. || In this last case, the power was to demise for *three lives or twenty-one years*, or under, or for *any time or term of years upon one, two, or three lives*, or as tenant in tail in possession might do. The lease granted under it was for ninety-nine years determinable upon three lives. It was insisted, that a lease for twenty-one years only, determinable upon lives, could be granted. But the objection was overruled. (*a*) Com. Rep. 39 *per* Holt, C. J., Hotley v. Scott, Lofft, 316; and see Dougl. 572; Campbell v. Leach, Ambl. 740.||

It was said by the judges, in 3 Keb., that the construction in Whitlock's case, that a person, having power to make leases for three lives, could not make a lease for ninety-nine years determinable on three lives, was too nice, and expressly contrary to the intent of the parties.

3 Keb. 746.

Yet in a late case, where A made a settlement, and limited the estate to himself for life, remainder to his son B for life, with several remainders over with a power to B when he came into possession, *to assign or limit the same to any woman* that he should marry, or *for the use or in trust for her*, in lieu of her jointure; B on his intermarriage, by deed reciting his power, demised the estate to trustees for 99 years, in trust for her, if she should so long live: though it was agreed, that this was no greater estate than by the power he was enabled to make, being to determine on her death, and that an estate for years was, in the eye of the law, of shorter duration than an estate for life; yet it was resolved, that the power being positive, and specifying what estate was to be limited, ought to be construed and pursued strictly, being to arise out of the estate of a third person; (*a*) and they agreed the rule laid down in (*b*) Whitlock's case, that all positive particular powers must, in all material circumstances, be positively and particularly pursued.

Mich. 8 Geo. 2; Rattle v. Popham, in B. R., 2 Stra. 992. (*a*) [The widow afterwards filed her bill in Chancery; and Lord Talbot held the lease to be warranted by the power, saying, that it was not *a defective*, but *a blundering execution*, and he decreed the defendant to pay all the costs both at law and in equity. 2 Burr. 1147; 2 Ves. 644.] ||And this decision of Lord Talbot was cited by Lord Mansfield as supporting his favourite doctrine, that whatever is an equitable ought to be deemed a legal execution of a power. Zouch v. Woolston, 2 Burr. 1147. But it appears from a report of the case, which is to be found in the Appendix to Mr. Sugden's Treatise of Powers, that Lord Talbot admitted clearly that the power was not well executed at law, but he relieved the wife on the general rule of equity. In a late case before Lord Redesdale, (Shannon v. Bradstreet, 1 Sehr. & Lefr. 71,) in which his lordship combated the above doctrine of Lord Mansfield, he said, that if Lord Mansfield found fault with the decision in the case of Rattle v. Popham, as he was represented to have done, he (Lord Redesdale) thought, with deference, that there was no ground for the remark. In a later case, (Roe v. Prideaux, 10 East, 158,) where the power authorized a lease "for any number of years not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives be at any one time in being in any part of the premises," the court held, that the power authorized a lease for years or a lease for lives, but not a lease for years determinable upon lives. They relied upon the distinction in Whitlock's case, where the power, as in this case particularized the species of lease, and they treated the case of Rattle v. Popham as well decided in law. See also Churchman v. Harvey, Ambl. 335. This doc-

trine, that whatever is an equitable, ought to be considered as a legal execution of a power, is now completely exploded. Wykham v. Wykham, 18 Ves. 415.‖ (*b*) 8 Co. 70; Ley, 74; Co. 45. Same rule laid down.

One had power in effect to make leases for the lives of A, B, and C, and he makes a lease to them for three lives, and the life of the longer liver of them: this was held to be sufficient within the power, because for three lives generally, and for three lives and the longer liver of them, is all one, since without such words it would have gone to the survivor.

3 Keb. 44, Alsop v. Pine. ‖ See Doe v. Hardwicke, 10 East, 549, where under a devise of seven different estates to a sister, brothers, and nephew respectively, one to each stock, including, as to six of the estates, three several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make three, in like manner as after mentioned for other persons to do the same;" and then giving this general power, "that *when and so often* as the lives on either of the estates before given shall be *by death reduced to two*, that then it shall be in the power of the person or persons then enjoying the said estate or estates to *renew* the same with the person or persons to whom the revenue thereof shall belong, by adding a *third life* in such estate, and paying such reversioner two years' purchase for such renewal; and also to *exchange* either of the said two lives on payment of one year's purchase;" it was holden, that this power of renewal authorized only the addition of one life to the three on each estate, and one exchange of a life.‖

Tenant in fee makes a lease for life, and after levies a fine to the use of J S for 15 years, remainder to the use of himself for life, with power for himself to make leases for 21 years, or three lives in possession; and the question was, if by virtue of this power he might make leases during the continuance of the term for 15 years, or not till after that was ended? and *per curiam* clearly, he may make leases presently in possession; for the power issues out of the whole estate, and by virtue thereof he may make leases in possession presently, and need not stay till the term end,(*a*) or the lands come into possession, and the termor shall have the rent reserved thereon. And they agreed, that, as this power was, he could not make leases in reversion, but the term of 15 years was immediately subject to the power, and when that is executed it will charge the possession.

2 Bulstr. 216; Cro. Ja. 249; Roll. Rep. 12; 2 Roll. Abr. 260, Fox v. Prickwood. (*a*) ‖ *Qu.* as to this, and see what Mr. Sugden says of it in his Treatise of Powers, 585, note.‖

‖ Where lands were settled to A for life, then to trustees for a term upon such trusts as A should direct, and then to uses in strict settlement, with a power of leasing to A, and A first declared the trusts of the term for payment of his debts, and then granted a lease in exercise of his power; it was objected, that the estate was bound by the declaration of trust by A, and that he could not afterwards execute his power so as to overreach the term; but the objection was overruled, for the term was originally subject to the power being contained in the same deed, and he having executed his power, the lease is precedent to the term, and controls it.

Talbot v. Tipper; Skin. 427; Sugd. Pow. 340.‖

Tenant for life, with power to make leases for 21 years, rendering the ancient rent, makes a lease for 21 years, to begin such a day after: this is not pursuant to the power, and consequently void, because *pro tempore* it is a future lease, which this power does not warrant, but it ought to be made in possession; for if he might make leases in reversion, or *in futuro*, though but a month after, he might as well make them to begin 20 years

after, or after his death, and so defeat the intent of the power, which being to charge the estates of third persons, is to be taken strictly.

Palm. 468; Cro. Eliz. 5; 6 Co. 33; Leon. 35; 3 Leon. 130; 4 Leon. 64; Moore, 199; Poph. 9; Yelv. 222; Cro. Ja. 318; 2 Roll. Abr. 261; Raym. 247.

But, where a husband, seised of lands in right of his wife, made a lease for 21 years pursuant to 32 H. 8, c. 28, and after, by a private act of parliament it was enacted, that the husband should have those lands for his life, remainder to his wife for life, and that all leases and grants thereof made or to be made by the husband for three lives, or 21 years, reserving the ancient rent, should be good, and the husband after made a lease of these lands, to begin after the expiration of the first lease; it was held good; for the lands being in lease at the time of the making of the act, the intent of the act seems to warrant such lease in reversion, and the rather, because there was no restraint from making leases in reversion, as there is in 32 H. 8, c. 28, which seems implicitly to give a power of leasing them in reversion. But they agreed, that if the lands had not been in lease at the time of making the act, or if a lease had been made in possession pursuant to the act, the husband could not in either of these cases have made a lease in reversion, or to begin at a future time; because then the power might well be executed by making leases in possession, which here, having but a reversion himself, he could not. It was also held, that a commission from the queen to make leases for 21 years, to save her the trouble of making them, would not warrant leases in reversion.

Dyer, 357; Leon. 36; 3 Leon. 71; 4 Leon. 66; 2 Roll. Abr. 261. See Sugd. Pow. 582, notes.

[So, tenant for life of the reversion of lands that were in lease for lives, by virtue of a power under a settlement, (providing "that it should be lawful for every person who should be actually seised of the freehold of the premises limited in use, to make leases of any part thereof which had been usually letten for lives or years, of which he should be so actually seised by virtue of the limitations aforesaid, by indenture, for any term not exceeding 21 years, or determinable on one, two, or three lives, &c., so as there were not in any part of the premises so leased at any one time, any more or greater estate or estates than for 21 years or three lives, or for any number of years determinable upon three lives,") made several leases for 99 years, to commence from the death of a remaining life in a former lease. And the question was, if these leases were pursuant to the power? It was objected, that they were leases in reversion. But it was answered, that when a man made a settlement of the *reversion* of lands *demised* for life or years to the use of one for life, with power to make leases *generally*, he may make a lease during the continuance of a former lease, to commence after the former, as otherwise his power would be ineffectual.

Coventry v. Coventry, Com. Rep. 312. ‖ This case was argued several times, but the ground of the decision is not stated. The case, says Mr. Sugden, perhaps, turned (a conjecture which seems fortified by a manuscript report of the observations of the Chief Justice immediately after the first argument, since discovered in Linc. Inn Libr.) on the particular penning of the power, with a "so as there were not," &c.; and upon the old leases and the reversionary lease there were not at any one time upon any of the lands demised more or greater estates than estates for years determinable upon three lives: the court therefore might well have relied on this clause as evidence of the intention that leases in reversion might be granted, so as with the leases in possession they did not exceed the limits pointed out. Mr. Sugden adds, it seems, far from clear that at the present day a lease in reversion would be supported under a general power,

although the estate was in lease at the time of the settlement, unless there were some direct evidence, as in this case, of the intention of the parties. Sugd. Pow. 584, 585.‖

However, where C, under a power to make leases for one, two, or three lives, or for twenty-one years, reserving the ancient rent, demised to B for twenty-one years, to commence after the death of I and M, who were tenants for life at the time of making the settlement, and who lived for several years after; it was holden, that the power was not well executed, the lease being to commence *in futuro.*

Baynes v. Belson, Sir T. Raym. 247. But this case did not receive decision, but was adjourned, other questions arising therein. And it is observable, that the court are said by the reporter to have founded their resolution on this point on the case of Slocomb v. Hawkins, as reported in Yelverton, 222, and on that of Sussex v. Wroth, as cited 2 Roll. Abr. 261, and 6 Co. 33, both of which cases, upon the statements in those books, apply only where reversionary leases are made under a power *attaching* upon estates in *possession.* Pow. on Powers, 419. See also Sugd. Pow. 584.]

‖ Under a power to tenant for life to lease for 99 years determinable on one, two, or three lives, a lease for 99 years, if A should so long live, to commence from the death of B and C, (two lives on which a subsisting lease for lives was determinable,) was holden to be void.

Doe v. Hiern, 5 M. & S. 40.

Under a special power to lease in possession, and not in reversion, a lease for years granted to the tenant then in possession, *habendum* as to the arable land from the 13th of February preceding, and as to the rest of the premises to begin from a future day, was holden to be void; although it was made according to the custom of the country, and the lands had been before granted in the same way by the person creating the power. But, where a tenancy from year to year has expired, a lease in possession may be duly granted,(*a*) although the old tenant has a right to depasture the meadow, &c., till a future day.(*b*)

Doe v. Calvert, 2 East, 376. (*a*) Ibid. (*b*) Doe v. Snowden, 2 Bl. Rep. 1224.‖

One possessed of a manor for 99 years, by his will devises it to A, his wife, for her life, with power *to let, set, or make estates out of it, and that in as ample a manner as I myself might, if I were living;* and after the death of A he devises it to B, his daughter, and the heirs of her body begotten, and dies, and A being his executrix, consents to the devise, and after makes a lease of part of the said manor to C for 99 years, if three lives so long live, and dies: this was adjudged a good lease against B, the daughter; though it was objected, that A had power to dispose of it only during her own life, because otherwise she might defeat the remainder limited to the daughter. But the court held, that the disposition made by her should continue after her death, otherwise the power would be merely idle, since without it she might have disposed of it during her own life.

2 Roll. Abr. 261, Hele v. Green, adjudged on a special verdict.

One seised of lands in fee makes a lease for 99 years, if three lives should so long live, and after settles the reversion on himself in tail, with power to make leases for one, two, or three lives, or for 21 years in possession; and after he makes a lease for 21 years, to begin after the expiration of the first lease; and if this was pursuant to his power, was the question? And the court agreed, that where tenant in possession makes a settlement with power to make leases generally, there he can only make leases in possession; but, where he that makes the settle-

ment had only a reversion at the time, there, he may make leases out of that reversion; for that agrees with the intention of the parties, which is to be the guide in the construction of all such powers: but here, the power being expressly to make leases in possession, this lease, which was of the reversion only, is not within the power, as the court seemed to agree; though it was urged, that a lease *in præsenti* of the reversion was consonant to the intent of the parties, and such a lease in possession as the nature of his estate would admit of; *ideo quære?* And *note*, the case of Slocomb v. Hawkins, as it is reported in Cro. Ja., [and also in Brownlow,] seems to impeach the diversity agreed on by the court; for there it is put, that tenant in fee of a manor which was then in lease for years, levies a fine thereof to the use of himself for life, remainder to his eldest son in tail, with power for the tenant for life to make leases at any time for 21 years; and before the first lease expired the tenant for life made a lease for 21 years, to begin after the determination of the first lease, and died; and though the settlement itself was of a reversion, and the power general, yet this lease in reversion was adjudged void; for that, as the court said, it ought to have been a lease in possession. But Yelverton, who reports the same case, mentions it as a settlement of lands in possession,(*a*) and that the tenant for life made a lease for 21 years, and after, before the expiration thereof, made another lease for 21 years, to begin after the expiration of the first lease; and this second lease was adjudged clearly void, and contrary to the meaning of the power.

Lev. 167; Sid. 260; Raym. 132; Keb. 778, 910; Opey v. Thomasius, and vide 4 Mod. 6; Marquis of Antrim v. Duke of Buckingham, 1 Ch. Ca. 17; 1 Sid. 101; S. C. and Sands v. Ledger, 2 Ld. Raym. 792; Cro. Ja. 818, by the name of Shecomb v. Hawkins, 1 Brownl. 148, S. C.; Yelv. 222, by the name of Slocomb v. Hawkins. (*a*) ‖ Winnington in his argument in Opey v. Thomasius, notices this difference between the reporters, and says that the record of the case does not warrant Croke's report. Raym. 133.‖

Devisee for life, with power to make leases for twenty-one years, whereupon the old and accustomed rent shall be reserved, makes a lease for twenty-one years, under the old rent, &c., and a year before the expiration of that lease he makes a lease to another for twenty-one years, *to begin presently:* this lease seems to be good within his power as a concurrent lease, because it is no charge upon the reversion, nor is there any more than twenty-one years *in toto* against the reversioner; but this power would not warrant the making of leases in reversion; for then he might charge the inheritance *ad infinitum.*

Leon. 147, Read v. Nashe. See the next case in margin.

[Lord Ferrers was tenant for life under a settlement in which there was a power, for the tenants for life, *respectively*, when they should respectively come into and be in actual possession of the premises settled, by indentures under their hands and seals, to demise all or any of the said premises, or any part thereof, in possession, but not by way of reversion or future interest, &c. Part of the premises subject to the power were let by the agent for the tenant for life by agreement in writing, from the 15th March, 1775, to occupy till the 10th March, 1776, to three persons, and the rest was at the time of the lease in the occupation of tenants at will. Afterwards, on the 17th of August, 1775, Lord Ferrers, by indenture, reciting the power, demised part of the premises to the defendant for 99 years, from Lady-day then last, if she should so long live, at the yearly rent of, &c. It was objected to this lease upon motion for a new trial, (the defendant, the

lessee, having gotten a verdict in ejectment brought by the remainder-man to recover the premises leased,) that it was a lease in reversion, and, therefore, contrary to the power and void; for it was contended that Lord Ferrers, at the time of this demise, could not grant an immediate lease in possession, because part of the premises were then let, under an express agreement, for a term of which several months were then to run; and though the rest was stated to have been in the hands of tenants at will, yet, as the law then stood, they must be considered as tenants from year to year, and entitled to six months' notice. Lord Ferrers, it was insisted, could not have brought an ejectment against any of them at the time of the demise, and therefore had no immediate possessory right; such right and the right to recover in ejectment being convertible. It made no difference to this question, that the subsisting leases were not by deed, since a parol lease for three years, or less, was equally effectual with a lease by indenture; and the court could not draw the line and say, that a lease granted under a power like the present should be good although there was a subsisting term of *seven months* at the time of granting it; but should be void if there was a subsisting term for *seven years:* the legislature only, or the parties, could draw such a line. Sir Orlando Bridgman, the father of conveyancers, and who probably invented these powers, laid it down, it was said, that all leases, where there was a particular estate out, were leases in reversion. And the interposition of the legislature in 4 Geo. 2, c. 28, § 6, to enable landlords to renew leases for lives, although the under-tenants should not likewise surrender, corroborated this doctrine. But it was answered by the other side; first, that the tenants assented to this lease, and surrendered their possession before the execution of it, in order to make it valid. This had been expressly left by the judge to the jury, who found that the defendant was in possession at the time of the execution. Secondly, that if the jury had not found the lessee to have been in possession, *still this would be good as a concurrent lease:* for this Read v. Nashe was cited, and the reason there given for supporting the lease was said to be a strong one; namely, that the inheritance was not charged in the whole with more than twenty-one years. No authority, it was said, had been cited against this case, nor any answer given to the reasoning in it. Thirdly, that, in respect of the power, all the subsisting leases were leases at will; there was no outstanding lease as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the case of leases under the power, (and these were not in many respects according to it,) the possession would devolve upon him the instant of the death of the tenant for life. And, swayed by these arguments,(*a*) the court unanimously held the lease to be good, notwithstanding this objection.

Goodtitle v. Funucan, Dougl. 565. See the power at large *supra*, 578.] (*a*) ‖ We must caution the student against admitting this case as an authority for a concurrent lease under a private power. The jury having found that the lessee was in possession, the court were not called upon to say, whether the lease was or not good as a concurrent lease, and they cannot be considered as deciding that it was. But granting that it was so decided, upon what does this gratuitous decision rest? Upon the authority of the case of Read v. Nashe; a case which, for aught appears, was never decided. The only report of it is that in Leonard; and that report gives no more than the argument of the plaintiff's counsel; the greater part of which is to other points, without a hint or intimation from any one judge as to this point; so that we know neither the ultimate determination nor what fell from the court in any part of the argument. And this is the case which is to serve as an authority for this doctrine, because "no au-

thority was cited against it, nor any answer given to the reasoning of it." Whether any authority was cited against it, we know not; but, if the case was decided at all, it is not probable that it was decided without the court's hearing the argument of the counsel on the other side, when an answer must have been given, or at least have been attempted to be given. And an answer was not perhaps a matter of any very great difficulty; for if it were thought necessary, as we find it was, to refer to the case of Fox v. Collier in aid of the reasoning, it might be shown that that case did not apply to private powers. This has been done most satisfactorily by Mr. Sugden, whose arguments and observations are of too great extent to be introduced here, and we should run the risk of impairing their perspicuity if we were to attempt to abridge them; we must therefore refer the student to his very ingenious and learned Treatise of Powers, p. 595—603.—The weight, which the opinion of so great a judge as Lord Mansfield in general carries with it, must in this case be considerably diminished by the very circumstances of the times; for it is to be remembered, that the argument which preceded the judgment was delivered shortly after the riots in the year 1780, in which his lordship's papers and the notes he had taken on the first argument had been destroyed, and when his mind could scarcely have recovered from the shock it had sustained from the violence to which he had been exposed. It surely therefore required to be examined with a more than usual care. And yet it has so happened, that it has been implicitly received, and later judges have appealed to it as a settled authority on the point in question; one of them (Mr. Justice Grose) declaring, in giving the judgment of the court in Doe v. Calvert, 2 East, 384, that a concurrent lease might have been granted according to the case of Goodtitle v. Funucan; and another judge (Lord Ellenborough) asserting in Roe v. Prideaux, 10 East, 185, that the right of granting a second chattel lease was settled in Read v. Nashe, and is recognised as law in Goodtitle v. Funucan.* —But, although a concurrent lease cannot be made, yet a surrender may be taken of the old lease, and a new one granted; and if such grant be to the old tenant, it will operate as a surrender in law of the old lease, Wilson v. Sewell, 4 Burr. 1975; 1 Bl. Rep. 617, provided it be good and pass all the interest it purports to give; else even the cancellation of the old lease will not amount to such a surrender. Roe v. Archbishop of York, 6 East, 86; Lowther v. Troy, Ir. T. R. 198.‖

‖ Where a lease was in existence under a power of leasing, and a further term was granted under the same power to the person in whom the first lease was vested; the judges seem to have considered it as void, though the terms did not together exceed the number of years for which leases were authorized to be granted. There was indeed no decision on the point, because the case was disposed of without argument upon another ground.

Doe v. Cavan, 5 T. R. 592.‖

Tenant for life, with power to make leases for three lives, or twenty-one years, cannot make such leases by letter of attorney, by virtue of his power; because such leases not being derived out of the interest of the tenant for life, but by an authority derived from the tenant in fee, and to charge the estate of third persons, the trust for that purpose is personal, and cannot be delegated to another.

9 Co. 76 a; Roll. Rep. 393. ‖ The lease in this case is not a lease of the land, but a declaration of the prior use; and the lessee comes in by the original agreement under the first settlement. The power is in such case personal to the owner of the land, because it refers to the first settlement. Palm. 436. See Attorney-General v. Gradyll, Bunb. 92; but there it was not necessary to decide this point. Sugd. Pow. 174.‖

‖ A fine was to A for life, remainder to his executors, administrators, and assigns for 80 years, with power to him and his assigns to lease in possession or reversion for 21 years, determinable upon three lives, reserving

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* We cannot help observing, that the reporter has forgotten the very useful hint he has, in his excellent preface, given to the student, that "he ought always to find leisure to consult the originals." Had he attended to it, he would have discovered that the case of Fox v. Collier did not arise, as Lord Mansfield has supposed, on the 13th but on the 1st of Eliz., and, consequently, was not affected by the 18th of Eliz., Dougl. Rep. 573, n. (c), 3d edit.

the ancient rent. A devised the term of 80 years to B, and died. B then died, and his executors assigned it to C, who made a lease. It was holden, that C, though assignee after so many removes, might execute this power; and that assignees might include assignees in law as well as fact; and that B under this devise of the term to him was assignee, and the power in the strictest acceptation was in him, and, consequently, must go to his executors, and by the same reason to their assignee.

How v. Whitfield, Sir T. Jon. 110; 1 Ventr. 338, 339, S. C.; 2 Show. 57, S. C.; 1 Freem. 476, S. C.

Where by a settlement a power of leasing was given to a father, tenant for life, and after his decease, to his son, tenant for life, and the son obtained an assignment of the father's life-interest, it was holden, that he could not exercise his father's power of leasing, or his own, till he came into possession in his own right as tenant for life in remainder.

Coxe v. Day, 13 East, 118.‖

A makes a lease to B for life, and after levies a fine to the use of C for life, remainder to himself in fee, with a proviso or power to make leases for 21 years, or three lives, and that the conusees should stand seised to such uses; afterwards A covenants to stand seised to the use of D in tail, with divers remainders over, and after grants the reversion aforesaid to E for life, who distrains B and avows; and judgment was given against the avowant; because by the covenant to stand seised, &c., A had destroyed his power of making leases, and, by consequence, the grant to E not being derived thereout, could not affect any of the preceding estates.

Noy, 66, Cooke v. Bromehill. ‖ The conveyance of the whole life-estate, although by way of mortgage, will equally extinguish the power to lease. Lord Mansfield indeed held otherwise in the case of R. v. Bulkeley, Dougl. 292; but he did so in opposition to adjudged cases, Vincent v. Ennys, and Corker v. Ennys, before Lord Chancellor King, Vin. Abr. tit. *Authority*, (G.) pl. 10, and to the general sentiments of the profession. In Stone v. Evans, Abbot on Merchand. 14, n. b, the case of Eaton v. Jaques, Dougl. 455, decided also by Lord Mansfield, the doctrine of which depended on the same principle with that of R. v. Bulkeley, was attacked with great force by Lord Kenyon, and has been since overruled in the case of Copeland v. Stephens, 1 Barn. & Ald. 593.‖

One hath power to make a lease for ten years, and he makes a lease for twenty years; yet in equity this is good for ten years, and so it has been settled several times.

1 Ch. Ca. 23, Pawey v. Bowen. ‖ *Qu.* whether good in equity unless made in favour of persons immediately under its protection, such as creditors and purchasers for a valuable consideration, without notice.‖

One having power to make leases for twenty-one years in possession, made a lease to A for twenty-one years in trust for the payment of debts; but the lease was made to commence from a time to come, and so not pursuant to the power; yet, being made for the payment of debts, was supported in equity.

Ch. Ca. 10, Pollard v. Greenvill; 1 Ch. Rep. 185, S. C.

[Tenant for life of estates situate in Ireland, with full power of making leases for any term not exceeding 31 years *or* three lives, *to commence in possession*, at the best improved rent that could be had for the same, made a lease "*from the date for and during the natural life and lives of three persons and the longest liver of them, or, for the term, time, and space of* 31 *years, to commence from the date, which should last longest, from thenceforth next ensuing, fully to be complete and ended.*" On an eject-

ment brought, in the Court of Exchequer in Ireland, by the heir at law and remainder-man, and a special verdict returned thereon, the question was, whether this lease was good within the terms of the power? On argument before the barons, it was adjudged that it was good, which judgment was affirmed on a writ of error in the Exchequer-chamber there, before the Lord Chancellor of Ireland, assisted by Lord Annaly, the Chief Justice of the Court of King's Bench, the constituent members of that court. But Lord Annaly having delivered his opinion for reversing the judgment, a writ of error was brought in parliament. It was there argued on the part of the remainder-man, that the lease was bad, for that it was in manifest opposition to the power; because, instead of being a lease for one or other of the terms expressly, as the power directed, it was a lease for the one or the other as chance should direct; and that he, being a purchaser for the most valuable of considerations, had a clear right to exact a strict performance of the condition annexed to his father's power of leasing. But it was contended on the other side, that, in cases of this kind, all a remainder-man could reasonably expect was, that an estate, when it came to him, should not be charged beyond what it was the intention of the settlor to allow those who stood before him to charge it. That it would not be so by the lease in question, if it were construed as a good lease for three lives, and no longer. That courts of law, who, in modern times, had adopted the same rules of construction which prevailed in courts of equity, in the construction of powers and of the instruments by which they were executed, would, when they had been exceeded, correct the excess, and support the execution *so far* as it was warranted by the power. That the lease in question, so far as it was a lease for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was to secure the estate to the lessee for 31 years, in case the lease for lives should determine sooner. But this, whether it was considered as concurrent or contingent, was not warranted by the power. The lease was adjudged good; and the judgment affirmed.

Commons v. Marshall, 6 Br. P. C. 168.]

|| Where a person having power to grant leases of his estate, by one instrument granted several, some of which were not within the power; though all were by the same instrument, they were considered as several leases, and it was sent to the master to separate them.

Lord Conway's case, cited in 2 Ves. 645.||

If one makes a feoffment in fee to the use of himself for life, with power to demise, lease, grant, or devise the lands for three lives, or 21 years, yet this gives him no other power in effect than to limit the use of the land for three lives, or 21 years; for all leases to be made by him by virtue of such power take their essence out of the original feoffment: therefore, if he makes a lease for three lives, and makes livery of the land, this is a forfeiture of his own estate for life; because he himself being only tenant for life, cannot out of that estate make such leases; and when he takes upon him to make livery of the land, he takes upon him to make the lease as owner of an estate sufficient for that purpose, which he is not; and to make such leases no livery is requisite, because they taking effect out of the first feoffment, the livery made upon that is sufficient to supply all the future limitations to be made in pursuance thereof. But, if he pursues the

words of the power, and says only, *I demise or lease such lands to you for three lives*, this is sufficient, and will be taken in execution of the power a good lease for three lives. So if he only says, *I limit the use to you for three lives*, &c., this likewise is sufficient, because this in effect is the substance of his power, and the statute presently carries the possession after such use. So, if one hath power only to limit new uses, and he gives or devises, &c. the land itself; this is also good, and enures as a limitation of the use, because the use is but an equity to have the land itself, and when he gives, demises, or devises the land itself, he also gives all his use and equity therein, and then the statute executes the possession accordingly.

Moore, 514, 611, 645; 2 Lev. 149; Vent. 291; 3 Keb. 512, accord, that it is the best way to make no livery; but Hale thought it no forfeiture, because by the sealing of the deed the lease takes effect, and then the livery comes too late.

It was found by a special verdict, that A, being seised of the manor of M, did, on his son's marriage, settle the same to the use of himself for life, and after to the use of his wife for life, then to the son in tail, with the following proviso or power; viz.: *That it should be lawful for the said A, during his life, and for his wife, after his death, during her life, by deed indented to make leases, either in possession for the term of one, two, or three lives, or for the term of thirty-one years, or for any other term or terms, number or numbers of years, determinable upon one, two, or three lives, or in reversion for one or two lives, or for thirty years, or for any other term or number of years, determinable upon one or two lives; so as such demise be not made of any the ancient demesne lands, parcel of the said manor, or of any other lands which for the space of seven years have been used as demesne lands, and so as the ancient rent be reserved;* afterwards A, by deed makes an absolute lease for thirty years of copyhold lands, parcel of the same manor, which were in the tenure of J S for the term of two lives, to commence after the two lives then in being. And in this case it was held by Holt, Chief Justice, Turton and Eyre, Justices, *contra* Rokeby, 1. That a lease of copyhold lands was not warranted by the power, being within the exception of ancient demesne lands, all copyhold lands being ancient demesne, it being an inseparable quality of every copyhold, that it was time out of mind parcel of the manor. (*a*) 2. It was held by the said justices, against Rokeby, that a lease for 30 years absolute in reversion after two lives, might be made by A or his wife of any lands which were in their power of leasing; and herein Holt held, that a lease to commence at any day to come is properly a lease in reversion; but in this case it signifies *a lease to commence after some interest in being at that very time when the lease in reversion was made;* that this power to lease for life in reversion must be taken to be a lease of the reversion itself, and not a concurrent lease, and that it cannot be otherwise, because a freehold cannot commence *in futuro;* and where there is a power given to make leases in possession and reversion, in such case if a lease is made in possession, and afterwards some life drops, he cannot make a new lease in reversion of the same lands, because his power is executed by making the first lease: that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification; as, where there is a power to make a lease of a manor, or of any part thereof, so as the ancient rent be reserved, yet he may by this power make a lease of the services, parcel of the manor, upon which no rent can be reserved; otherwise the express power would be defeated.

Winter v. Loveday, Carth. 427; 2 Salk. 537, S. C.; 5 Mod. 245, 378, S. C.; Ld.

Raym. 265, S. C.; Com. Rep. 37, S. C.; Comb. 371, S. C.; 12 Mod. 147, S. C.; Freem. 507, S. C. (*a*) || Rokeby thought that the exception extended only to lands in the occupation of the donor. He, however, held, that copyhold lands were not within the intent of this proviso; and that if the demesne lands had not been excepted by express words, yet the power of leasing would not have extended to them; for if it did, it would destroy the tenure, because copyhold lands once leased are for ever enfranchised; and therefore it shall never be presumed that the tenure was intended to be destroyed without express words for that purpose. This, says Mr. Sugden, is an important general rule of construction applicable to every power. Powers, 581, 582.||

A man made a voluntary settlement on his son for life, and after to his first and other sons in tail, with power to the son to make a lease in possession for ninety-nine years, determinable on three lives, and also to make leases for sixty years, to commence after his death, if he had issue male, to continue so long as he had issue male: the son makes a lease to his father in trust for one of his younger children, but the lease was not pursuant to the power; yet it was decreed good and taken to be a lease made by the father after a voluntary settlement.

Abr. Eq. 342, Gooding v. Gooding. || Anon. 2 Freem. 224, seems to be S. C., and there said that if the power is created by the act of the party, there, in the case of a purchaser, or of a provision for a child, although the power be not strictly pursued, equity will help it, at least to make it good, so far as it might have been good by virtue of the power, if it had been duly executed; as, where there is a power to make leases for twenty-one years, and the party leases for thirty, this will be made good in equity for twenty-one years, in case of a provision for a child or a purchaser. In Sayle v. Freeland, 2 Ventr. 350, Lord Nottingham said, there is a difference where a man has power to make leases, &c., which shall charge and encumber a third person's estate; such a power is to have a rigid construction; but, where the power is to dispose of a man's own estate, it is to have all the favour imaginable.||

{ A tenant for life, with power to grant *building leases* for 61 years reserving the best improved ground rent, grants a lease for that term, which is not expressed to be a building lease, but which contains a covenant by the lessee to keep in repair the premises demised, (being old houses,) *or such other house as shall be built during the term.* This lease is void, not being a building lease. There is no covenant in it to build, nor does the covenant to repair imply it: for that at most only relates to rebuilding in case the buildings should fall down, and there is nothing in the lease that authorizes the lessee to pull down the buildings.

Willes, 169, Jones v. Verney.}

[The Duke of Montague was tenant for life, without impeachment of waste, with power to lease "reserving ancient and accustomed rents, heriots, boons, and services," under which power he granted several leases. In the former leases, the tenants covenanted to "keep in repair:" in those granted by the duke that covenant was omitted. The Lord Chancellor, after taking some days to consider of it, was of opinion, that that covenant was a boon, and beneficial to the remainder-man; and held these leases void for want of it. He said, that he was clear upon the argument; but he took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon, was, "*that the estate must come to the remainder-man in as beneficial a manner as ancient holders held it.*"

Earl of Cardigan v. Montague, 6th June, 1765, cited in 1 Burr. 122; Sugd. Pow. App. No. ix. S. C.]

|| Where the tenant for life, having a power to lease for a term not exceeding 21 years in possession, so as there should be reserved on every such lease the best and most improved yearly rent, and so as there

should be inserted such other conditions, covenants, and restrictions as are generally inserted in leases according to the usage of the country, demised lands according to the power, and inserted a covenant for renewal, subject to the same rents and conditions which were contained in the lease then granted; and the jury found that all the covenants were usual in that part of the country in which the lands were situated; it was argued that the lease was void, because the covenant for renewal operated indirectly on the interest of the remainder-man; for the tenant for life, for fear of an action of covenant, might be induced to renew at a less rent than the best that might be obtained, when the renewal should be applied for; but, by the court, the answer to that is, that if the fact be so, the renewed lease will be void, and the remainder-man may bring his ejectment, and recover the lands.

Doe v. Bettison, 12 East, 305.‖

[Under a power requiring the best rent that can be reasonably gotten, to be reserved payable during the term, there must be a covenant for payment; for under a mere reservation it is not payable till entry; and therefore, in fact, may never be payable during the term. Besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars. There must also be a clause of re-entry; else the ground may be unoccupied without any, or at least a sufficient distress upon it, so that the remainder-man can neither have his rent nor his land. The want of a counterpart too is an unusual omission, and very prejudicial.

Taylor v. Horde, 1 Burr. 125; 1 Keny, 241, S. C.]

‖ Where the power required the insertion of a clause of re-entry in the leases on non-payment of the rent for twenty-one days; and a lease was made with a power of re-entry in case the rent should be behind for twenty-one days, *having been lawfully demanded or no sufficient distress;* it was argued in support of the lease that nothing was added but what came in by force of law, or followed upon a deficiency of the vague, and not sufficiently explicit words of the power. Is not rent, it was asked, always to be demanded before a distress becomes liable or a forfeiture incurred? And as to the other, if there be a sufficient distress, what then? The rent will be recovered without re-entry; and neither in reason, equity, nor conscience, could there be any other intent of the original power. And Lord Mansfield said, that as to demand, a clause of re-entry was required as a security for the rent: demand is requisite both by common law and statute: a clause of re-entry will never be allowed to operate further than as a security for rent.

Hotley v. Scot, Lofft, 316; 2 Brod. & Bingh. 498, n. S. C., by the name of Lord Tankerville v. Wingfield.

But in a late case, where there was the same power, and the clause of re-entry in the lease was, *in case no sufficient* distress could be taken on the premises whereby to levy the rent, &c., it was decided that the lease was void: this condition being a serious restraint on the remainder-man not authorized by the power. But the above case of Hotley v. Scot was not referred to in this case.

Coxe v. Day, 13 East, 118. See Doe v. Meyler, 2 Mau. & Selw. 276.

In a later case, in a strict settlement there was the following power of leasing: "Provided always, and it is hereby further declared and agreed by both the said parties to these presents, that it shall and may be lawful to and for the said George Venables Vernon the younger, and Louisa

Barbara Mansel, his intended wife, from time to time during their respective lives, when and as they shall respectively be in possession of or entitled to the perception of the rents and profits of the manor, messuages, &c., so limited to them for their respective lives as aforesaid, by indenture or indentures under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant such part or parts of the said manor, messuages, &c., or parts or shares thereof, whereof they shall be in possession or entitled to the perception of the rents and profits as aforesaid, as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives." Then follow the restrictive clauses, among which are the following; "So as in every such lease for a life or lives, &c., there be reserved and made payable, during the continuance of the estates and interests thereby demised, the ancient and accustomed yearly rents, duties, &c., or more, or as great, or beneficial rents, duties, &c., as now are or at the time of demising were, reserved;" and then follows the clause on which the question in the cause mainly depends, "And so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." Then follow other restrictions, which need not be noticed. Immediately following this power is another power which it is necessary to attend to; the former power relating only to lands then let for lives, or for years determinable on lives. The second power runs thus: "And also by indenture, &c., to demise all or any of the said manor, messuages, &c., for any term or number of years absolute, not exceeding twenty-one years in possession, &c., so as upon every such lease there be reserved as much or as great and beneficial yearly and other rents as now are paid; or the best and most improved yearly rent, &c., without taking any fine, &c.," and concludes with this further restriction: "And so as in every such lease for any term of years absolute respectively, there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the time thereby respectively appointed for payment thereof." Mr. Vernon was tenant for life, and the premises in question had been let for years determinable on lives; and he on the 5th of September, 1803, made the lease in question, which is stated, and appears to contain a proviso or power of re-entry, "if it shall happen that the rent of 2*l.* and every or any of the duties, services, &c., shall be behind or unpaid in any part or in all by the space of fifteen days next over or after the times whereat or wherein the same ought to be paid, &c., and no sufficient distress or distresses can or may be had or taken on the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid." There is a general clause at the end of this lease, that if any default shall be made in the payment or performance of all or any of the reservations, covenants, or agreements before contained, it shall be lawful for the lessors, their heirs or assigns, to re-enter. The rent, duties, reservations, and payments were the ancient and accustomed; and the usual and accustomed form of leases of the estate contained in the said marriage-settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional power of re-entry, similar to that in the said indenture of lease.

Doe v. Smith, 1 Taunt. & Brod. 97; Sugd. Pow. 627.

It was adjudged by the Court of King's Bench, that the power was duly

executed. In the Court of Exchequer Chamber, Garrow, B., Wood, B., and Graham, B., were of opinion with the Court of King's Bench: but Burrough, J., Park, J., Richards, C. B., and Dallas, C. J., were of a contrary opinion. Each side relied on the lease of twenty-one years being required to be made with a clause of re-entry in case the rent should be behind twenty-eight days. On the one hand it was used as evidence that the term in the first power was left in the discretion of the donee: on the other, that the power of re-entry under the first clause was to be immediate.

Upon a writ of error returnable in parliament, this judgment of the Court of Exchequer Chamber was reversed, and the original judgment of the Court of King's Bench affirmed.

7 Price, 379; 2 Brod. & Bingh. 473.‖

[But, if the covenants be upon the whole such as leave the parties on the same footing as under former leases, their differing in trifling circumstances will not be material. Thus, it was objected to the covenants in the lease from Earl Ferrers to Mrs. Funucan, (by one of which she covenanted, that she would pay half the land tax, amounting to 7*l.* 10*s.* by the other of which the earl covenanted for himself, his heirs, &c., to free her from tithes and from levies and payments to the church,) that the covenants in the lease were not so beneficial to the remainder-man, as those in the ancient leases; for that in the former leases, the tenants covenanted to pay all duties and taxes, except the land tax; that church dues were particularly, by law, chargeable on the occupier; but by that lease the landlord covenanted to free the tenant from tithes and all levies and payments of the church. The new covenants were therefore less beneficial to the remainder-man, than those in the former leases. By the court—The power made no mention of covenants. The *ground*, therefore, must be, that the present covenants were a fraud on the power by lessening the value of the reservation; but on considering them fully, it appeared, that what is thrown on the landlord was compensated by what was paid by the tenant. She was to pay half the land tax. As to the church dues, the covenant seems to be collateral, and not to go with the land, or to bind the remainder-man, resembling a covenant for quiet enjoyment. But, if it did go with the land, there was no pretence of fraud on the power; the 30*l.* were *bonâ fide*, reserved as an ancient rent. What was stipulated with regard to tithes, was of no consequence, since none were payable.

Pow. on Powers, 579; Goodtitle v. Funucan, Dougl. 505, *supra.*]

‖ Under a devise of lands in Sussex, Huntingdonshire, Middlesex, and London, with a power to A, the tenant for life, and those in remainder during their respective possession, to make leases of the lands in Sussex and Huntingdonshire, for any term or terms of years not exceeding twenty-one, so as there were reserved by such leases *the most rent* that could be gotten for the same; and of the lands in Middlesex and London for any term or terms of years not exceeding sixty-one, so as there were reserved thereon *the usual or other the most rent* that could be had for the same; it was holden, that a lease of the lands in Middlesex upon a fine, and at a reserved rent, was in conformity with the terms of the power, the rent exceeding the rent reserved upon a former lease in being at the date of the will, and at the devisor's death, and a fine having been taken by the then lessor upon that lease.

Doe v. Creed, 4 M. & S. 371.

The *bonâ fide* reservation of rent for the enjoyment of the estate prior to the lease; as, where the lessee is in possession, and the lease is granted in a broken half-year, does not vitiate the lease; but a rent (*a*) must be reserved for the whole of the term.

Isherwood v. Oldknow, 3 M. & S. 382. (*a*) Doe v. Giffard, Sugd. Pow. 609.

It is not sufficient to impeach a *bonâ fide* lease without a fine, at a rent which the jury find to be a fair rent, that the tenant for life had offers of higher rents from other persons, against whose responsibility nothing appears; for there are many things to be regarded in the choice of a tenant besides the amount of the rent offered.

Doe v. Radcliff, 10 East, 278.

Where from the quantity and nature of the property demised, it is impossible to ascertain whether the rent reserved is the best rent, the execution of the power cannot be sustained.

Earl of Cardigan v. Montague, Sugd. Pow. App. No. ix. (2).

Under a power in a settlement reserved to the settlor to make leases with or without fine, and rendering such rents and services as he may think fit, it was determined, that no rent at all need be reserved.

Talbot v. Tipper, Skinn. 427.

But, under a power requiring the leases to contain usual, or usual and reasonable covenants, or the like, the covenants contained in the former leases must be inserted in the new leases.

Earl of Cardigan v. Montague, Sugd. Pow. App. No. ix.

Where a power to grant building leases required the leases to contain "the usual and reasonable covenants," and a lease was made in which the lessee covenanted to keep the old messuage and buildings on the land in repair, and to repair *such other messuages or buildings* as should during the term be built on the premises; the court, upon the whole, thought that this was not a building lease under the power; and Willes, C. J., said, that a reasonable covenant in a building lease must certainly be meant of a covenant to build; but there was none such in this lease.

Jones v. Verney, Willes, 169.

The lessee's doing that voluntarily which he ought to have been bound by covenant in the lease to do, will not supply the omission of the covenant.

Jones v. Verney, Willes, 169.‖

[As under a power to lease *reserving the usual covenants*, the omission of a usual covenant will vacate the lease, so the introduction of an unusual covenant in such case will have the same effect. Thus, where a tenant for life made a lease under a power in those terms, containing a proviso, "that in case the premises were blown down or burned, the lessor, or the persons who for the time being should be entitled to the freehold and inheritance, should rebuild, otherwise the rent should cease," the lease was adjudged to be void; the jury having expressly found such covenant to be unusual and unheard of.

Doe v. Sandham, 1 T. R. 705.

It is no objection to a lease under a power "that it is in trust for him who executes the power," provided the *legal* tenant be bound, during the term, in all requisite covenants and conditions.

Taylor v. Horde, Burr. 124; 1 Keny, 240, S. C.; Wilson v. Sewell, 1 Bl. Rep. 617; 4 Burr. 1975; Earl of Cardigan v. Montague, Sugd. Pow. App. No. ix. See also 1 Bl. Rep. 449.

(K) By what Form of Words Leases may be made.

|| Under a power to lease for any term of years not exceeding a certain number, a lease may be granted for the term, with a proviso, that upon tender by the donee of the power of one shilling, or the like, the lease shall become void; or in other words, says Mr. Sugden, a lease may be made for a term certain with a proviso determining it on a given event, at the option of the lessor. But it would be otherwise, if the power, as is sometimes the case, requires the lease to be for a term *absolute*.

Earl of Cardigan, Sugd. Pow. App. No. ix. (1). Pow. 595.

So, if the power be to lease for any given term, as for twenty-one years, without saying *for any term not exceeding that number of years*, a lease may be made for a less term.

Isherwood v. Oldknow, 3 M. & S. 382.||

(K) By what Form of Words Leases may be made.

HERE it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall devest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose: and on the contrary, if the most proper and authentic form of words whereby to describe and pass a present lease for years, are made use of, yet if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties: for a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompense of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly.

My Lord Coke tells us, that the words *demise*, *grant*, *betake*, and *to farm-let*, and whatever other words amount to a grant, may serve for a lease for years.

Co. Lit. 45 b; 2 Mod. 250. β Contracts creating the relation of landlord and tenant, or landlord and cropper, ought to be treated as other contracts in respect of the intention of the parties, and the evidence of custom as to their construction. Iddings v. Nagle, 2 Watts & S. 24.*g*

So, he says, *dedi* is a sufficient word to make a lease for years.

Co. Lit. 301 b.

But there are several other words which are equally sufficient to make a lease for years; therefore in the case of the king, if he makes a lease for years under the Exchequer seal in these words; *sciatis quod nos commisimus custodiam* of such land to such a one, this is a good lease, and the lessee may plead it as a demise or lease of the land itself; for this sufficiently shows the intent of the king to part with the possession of the land for the time, and therefore amounts to an effectual lease; and this being the usage in the Exchequer, all other courts are bound to take notice thereof.

Bro. tit. *Leases*, 71; 4 Inst. 111, 112; Co. Lit. 45 b; 2 Co. 17 a.

So, if one only license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time,

and may be pleaded as such, though it may be also pleaded as a license; and if it be pleaded as a lease for years and traversed, the lessee may give the license in evidence to prove it.

5 H. 7, 1; Leon. 129; 3 Bulstr. 252; Sid. 428; Mod. 14; 2 Keb. 561; 2 Lev. 194; 3 Keb. 761; Hard. 366.

[So, where the owner of a house and brewhouse entered into partnership, and assigned one-fifth, and covenanted that the partner should reside in the house, &c., it was holden, that he could not maintain an ejectment against the partner contrary to his own agreement. Besides, that as a license to inhabit, it amounted to a lease.

Right v. Proctor, 4 Burr. 2208; Ir. T. R. 450.]

So, if A by articles covenants with B that he shall have or enjoy such land for such a time, this is a good and effectual present lease, because here are sufficient words to prove a contract, that the one shall relinquish the possession, and the other come into it. But, if the covenant had been with B, that C, a third person, should have or enjoy such land of A for such a time, or that the executors of B should have or enjoy it for that time, this would be no lease to C or the executors of B, but only a bare covenant with B: for when these words have their natural and binding force as a covenant with B, they cannot at the same time have a different construction, and amount to a lease to C or the executors of B, who are strangers to the contract and no parties to the deed, and when those executors of B are not yet *in esse;* neither can these words amount to a lease to B, because the intent is manifest that he himself is to have nothing in the land, but is only a trustee of the covenant for C or his executors. And further, if these words should amount to a lease to C or the executors of B, when they came *in esse*, this would take off from their operation as a covenant with B; for the same words cannot at the same time have two different constructions and operations; and it cannot be said they are a covenant with B by the first words, and a lease to C or the executors of B by the last words; for that C or the executors of B shall enjoy the land, is the very explanation of the covenant with B, and gives life and force to it, and without that he covenants with B for nothing: for till these words are added, the covenant with B is but a dead letter, and has no meaning or sense in it.

Leon. 136, 303; Cro. Eliz. 1, 173; Owen, 97; Roll. Abr. 847; 3 Bulstr. 252; Fitz. tit. *Assize*, pl. 412.

So, where one by articles covenants, grants, and agrees with J S that he shall have such lands, or have, hold, and enjoy such lands for so many years, these are words sufficient to show a present contract for the lessee's enjoying of these lands, and therefore amount to a present lease of them as effectually as if there had been the words *dimisit*, *locavit*, or such like: and though there were in the same articles a covenant to make a good and perfect lease, as counsel should advise, yet that would not prevent or destroy the operation of the first words as a present lease; such covenant only being *in majorem cautelam*, that the lessee might require further assurance by fine, or the like, if he found it necessary. And the difference is, where such articles, by way of covenant, are made by him who is owner of the lands; and where they are made by a stranger, or one who has then nothing in the lands: in the first case they amount to a present and absolute lease; but not in the other, because a man cannot be supposed to lease what he has not; or if it

(K) By what Form of Words Leases may be made.

might be so supposed, yet when it appears in the very articles that he has nothing in the lands, his covenant then can have no other construction, but that he will procure the owner of the lands to permit the covenantee to hold and enjoy those lands; which is the proper and natural interpretation of the words of the covenant, when he himself has nothing whereof to make a lease.

Bro. tit. *Leases*, 20, 30, 60; Noy, 14; Cro. Ja. 42, 659; Palm. 201; Leon. 118, 119; 3 Bulstr. 252; Cro. Car. 207; Jon. 231; Hob. 35; Moore, 861; 2 Brownl. 23; Roll. Rep. 397; 3 Bulstr. 204; Roll. Abr. 847; Yelv. 85; Brownl. 136; Cro. Eliz. 223; Bro. tit. *Leases*, 21, only *cont. per* Fineux.

A controversy was between two persons touching a lease for years, which of them had title to it, and they submitted to the award of J S, who awarded that one of them should have the land; this was held to be a good gift of the interest of the land, that is, an award, that the whole lease, or interest in the land for the term then to come, belonged to one, exclusively of the other. But, if the award had been, that the one should permit the other to enjoy the term, this, it is said, would not have given him the interest in the land, nor would amount to a lease; that is, as I suppose, because the permission being to come from the other party, the interest must be supposed to be and continue in him; and therefore it could not amount to a lease, or an award of a lease: not to a lease, either from the arbitrator or the other; not from the arbitrator, because he had nothing in the land, and was only to award what the other should do; not to a lease from the other, because it was only the act and award of the arbitrator: neither could it amount to an award of a lease from the other, because it was only that he should permit the other to enjoy the term, which he might do without making a lease; and the words being spoken by the arbitrator, who was a third person, cannot have the same operation, as if they had been spoken by one who had interest in the lands, but must be taken according to the literal sense and meaning thereof.

Trusloe v. Yewre, Cr. Eliz. 223; 2 Leon. 104, S. C. by the name of Trusto v. Ewer, 2 Keb. 268.

Articles indented in writing were made between A and B in this manner: *Imprimis*, it is covenanted and agreed between the parties, that A doth let such lands for and during five years, to begin at Mich. next following, under 10*l.* a year rent; or provided that the lessee shall pay 10*l.* at Mich. and Ladyday, by even portions, during the term: also the said parties do covenant, that a lease shall be made and sealed, according to the effect of these articles, before the feast of All-Saints next ensuing: this was held to amount to an immediate lease, by reason of the first words in the present tense, and that the last words were only for making such a lease in writing for further assurance; and the rather here, because the lease to be sealed was to be made after the beginning of the term.

Cro. Eliz. 486; Moore, pl. 638; Roll. Abr. 847; 2 Roll. Abr. 449; Palm. 201. β Whether an instrument shall be considered a lease, or only an agreement for a lease, depends on the intention of the parties to be collected from the whole instrument. Berkeley v. Delacroix, 2 Wend. 433. See Hoskins v. Rhodes, 1 Gill & John. 266; Taylor v. Bailey, Wright, 646; Browning v. Haskell, 22 Pick. 401. γ

One said to another, "*You shall have a lease of my lands in D for* 21 *years, paying therefore* 10*l. per. an., make a lease in writing, and I will seal it:*" this was agreed by all the justices to be a good parol lease for twenty-one years, though no writing was made of it, (being before the statute of frauds,) for the intent of the parties was sufficiently expressed, and

the making of it in writing was but for further assurance, and left to the lessee, if he thought it necessary.

2 Bendl. 7; Moore, pl. 31; Cro. Eliz. 33, 306.

One made his will in this manner: "*I have made a lease to J S for term of twenty-one years, paying but* 20*s. rent:*" this was held a good lease or devise by the will for twenty-one years, and that the word *have* should be taken in the present tense, as *dedi* is in a deed of feoffment, to comply with the intent of the testator.

2 Bendl. 34.

[On the 28th of Nov. 1760, John Abrahall and P. Lloyd entered into an agreement (stamped with a two shillings and sixpenny stamp) with the defendant Browne, whereby they agreed, "with all convenient speed to grant to him a lease of, and they did *thereby set and let to him*" the premises in question, to hold for twenty-one years, at the rent of 290*l. per. ann.*, payable half-yearly "*to the lessors:*" the lease to contain the usual covenants, and certain special ones, in one of which the words "*this demise*" occurred. The defendant entered in pursuance of the agreement, and paid rent up to the first of March, 1774. The court said, this is a good lease *in præsenti*, with an agreement to execute a more formal and perfect lease *in futuro*. The operative words *let* and *set* are in the present tense. A reference is also made to *this demise*. There have been fourteen years' uninterrupted occupation under it, and five or six of them since the title of the lessor of the plaintiff accrued. He has accepted rent, and thereby given the defendant every reasonable hope of acquiescence. Under such circumstances, if the words of this lease can impart an *immediate* legal demise, the court will support it as such; and that they will, is evident from the cases cited, viz., 1 Roll. Abr. 847, Moore, 459; Noy, 57.

Baxter v. Browne, 2 Bl. Rep. 973.]

‖ The lessor of the plaintiff, by an unstamped agreement in writing, agreed to grant a lease to the defendant for twenty-one years: the defendant had had uninterrupted possession for eighteen years; but no lease had been granted by the one, or demanded by the other. Lord Mansfield said, that there might have been circumstances which would have supported the lessor of the plaintiff in this case; as, if he had tendered a lease, and had suffered some loss by the defendant's refusing to execute it; but that there were no such circumstances in the present instance; and if the court should say, that the ejectment ought to proceed, it would merely give the Court of Chancery an opportunity to undo all again, and the lessor of the plaintiff would have to pay the costs of both suits. The *postea* was therefore delivered to the defendant.

Weakly v. Bucknall, Cowp. 473. This case is cited in Lowther v. Lady Andover, 1 Br. Ch. Rep. 396, to show that an executory instrument may be a good defence in ejectment; an inference, however, which it does not warrant. But it would seem, from the case of Doe v. Groves, 15 East, 244, that the instrument would not enable the defendant to maintain his possession without a lease-stamp.

A memorandum of an agreement was to the following effect: A agreed to let, and B to take certain premises for the term of sixty years at a certain rent; and B, in consideration of a lease to be granted, agreed to lay out the sum of 2000*l.* in building within four years. A agreed to grant a lease as soon as a certain number of houses should be covered in. This agreement was to be considered as binding till one fully prepared could be produced.

(K) By what Form of Words Leases may be made.

Lord Ellenborough thought, that the intention was, that the tenant should have a present legal interest, though a more perfect lease was intended when the houses should be built, for the convenience of describing the premises, and for the purpose of assignments.

Poole v. Bentley, 12 East, 168.

By a deed indented and endorsed on an indenture of demise, and bearing date 28th Sept., 1758, between the lessor and the defendant, who was the assignee of the lessee, reciting that the term would expire in 1786, and that the lessor was willing to prolong the same, the lessor for himself, his heirs and assigns, did covenant and agree with the defendant, his heirs, &c., that he and they should hold and peaceably possess the lands in the said indenture of demise in as full and ample a manner as they were therein granted and demised to the original lessee, to hold the same to the defendant for the space of 34 years, to commence in May, 1786, he and they paying the reserved rent, and performing all the covenants contained in the indenture of lease. It was objected, that this was not a lease, but, at the most, a mere equitable article, and defective in the terms of grant and demise. But by the court: The instrument is found to be an indented deed, sealed and delivered by the parties, accepted and the possession entered on by the tenant: it is substantially clear and certain as to the lands, as to the term, its commencement and duration, as to the *habendum* and *reddendum;* it refers to and adopts all the covenants of the original lease; it is an agreement that the lessee shall enjoy, possess, and occupy; it does not import to be an article or merely executory; nothing further is covenanted to be done as to making future leases.

Jones v. Inman, Ir. T. R. 433.‖

[In ejectment, the lessor of the plaintiff derived title from the defendant under an instrument, purporting to be a demise for twenty-one years of the premises in question. The instrument was as follows: "Be it remembered that J B (the defendant) hath let, and by these presents doth demise, &c., unto R F, &c., for twenty-one years, to commence the 5th of May or 1st of November, whichever happens first after the said J B recovers the said lands from M O. The said R F covenanting and agreeing on the foregoing conditions to pay J B 100*l.* yearly and every year during the said term, &c.; *leases* with power of distress, and clauses for re-entering, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as J B recovers the said lands from M O." J B recovered the lands from M O and was then in possession of them. The court were clearly of opinion, that the instrument operated as a present demise, and that the agreement for a more formal lease was merely in further assurance.

Bury v. Nugent, 5 T. R. 165, in error from Ireland.]

But now, on the contrary, if the most proper form of words of leasing are made use of, yet if, upon the whole deed, there appears no such intent, but that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties, by construing a present lease, when the intent was manifestly otherwise.

Where words of covenant, &c., will not, in the case of copyholds, amount to a lease so as to work a forfeiture, vide *supra*, under leases made by copyholders.

Therefore, where articles were drawn between A and B in this manner: Articles agreed upon, &c., *Imprimis:* A doth demise such a close to B to have

it for 40 years, and a rent reserved, with clause of distress, &c. In witness whereof, &c., and afterwards there was written in the same paper a memorandum, that these articles are to be ordered by counsel of both parties, according to the due form of law: here, because the intent of both parties appeared by that memorandum, and by a lease actually drawn by counsel, but never sealed, (upon some disagreement between the parties,) it was ruled by the court, upon evidence in ejectment, that these articles were not a sufficient lease, and the jury found accordingly; and yet here was the form and words of a present and immediate demise or lease.

Noy, 128, Sturgion v. Painter.

β On the 13th day of November, A and B entered into a written agreement in these words: "It is hereby agreed by and between A and B, that A will let to B the use of the county-house in L, from the first day of December, 1817, to the 10th day of April, 1818, and B agrees to pay A the sum of three hundred and fifty dollars therefor, provided a majority of the court agree thereto." Held, that this writing was not a lease, but an agreement to lease on a precedent condition.

Buell v. Cook, 4 Conn. 238. For the difference between a covenant to lease and an actual lease, see 6 East, 530; 12 East, 274; Id. 170; 3 Taunt. 65; 5 B. & A. 322; 3 Johns. 44, 383; 4 Johns. 74; 10 Johns. 336; 2 Camp. 286. γ

So, where articles of agreement are drawn between A and B in this manner: first the said A is *contented* to demise such lands, &c., to the said B from Mich. next for six years; and after these words, the rent reserved is 100*l.* per ann. a re-entry for non-payment of the rent, a covenant for reparations, and a covenant to do such other things; and these articles are sealed and delivered by the parties: yet they do not amount to a lease, but are only preparatory covenants or instructions towards a lease, and never were intended to have the force or effect of a lease themselves; besides that, the word *contented* imports only an approbation of something to be done after. This case is cited in (*a*) Cro. Ja. in this manner: that if one covenants and grants with another that he shall *have and hold* such lands for ten years, that this is a good and absolute lease for that time; but if he covenants and grants that he shall *enjoy* those lands for ten years, this is no lease, because it sounds only in covenant. *Quære* of the difference between *holding* and *enjoying*, for there seems none; therefore the case must be mistaken.

Roll. Abr. 848; Pleazance v. Higham, 2 Mod. 81. (*a*) Cro. Ja. 172.

[On the trial of an ejectment the defendant produced in evidence a lease, as he stated, of the premises in question, but which appeared to be an agreement upon paper, *unstamped*, and not under seal, between the Earl of Abingdon, under whom the lessor of the plaintiff claimed, and the defendant's father. In the subsequent part of it were these words, viz. "And further the said Earl of Abingdon doth hereby agree to let, and the said Richard Way agrees to rent and take for the term of seven, fourteen, or twenty-one years, in case the said earl shall so long live, at and for the rent of 1400*l.* a year, to be paid half-yearly, (the said earl to pay or allow all manner of tithes and taxes, both ordinary and extraordinary,) all his estate, &c., at Rycot. It is agreed the said Richard Way shall enter on all the said premises immediately, but not commence payment of rent until Lady-day next. It is further agreed, that leases with the usual covenants *shall be made and executed* by the parties on or before Michaelmas next." It was contended, that this being produced as a lease, and not being stamped, could not be

read in evidence; and the judge being of that opinion, the plaintiff had a verdict. But on a motion for a new trial, the court were of opinion, that it was *not* a lease. The case in Noy, 128, of Sturgion v. Painter, they said, is in point. In the present case, there is also an express stipulation that leases *should be* drawn before Michaelmas: therefore, it plainly was not the intention of the parties that such agreement should operate as a lease, but only that it should give the defendant a right to the immediate possession, till a lease could be drawn. Had it been a lease, the court thought it ought to have been stamped.(*a*)

See Roe v. Ashburner, *infra;* Goodtitle v. Way, 1 T. R. 735. (*a*) See acc. Doe v. Groves, 15 East, 244.]

|| So, in a case already referred to *supra*, (LEASES, &c., I. 6,) an instrument on an agreement-stamp was made, reciting, that in case the lessor should be entitled to certain copyhold premises on the death of another, he would immediately demise them to the lessee, and declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a license from the lord. Here the intention of the parties appears strongly on the face of the instrument, that it should be executory. Besides this, at the time it was entered into the lessor was only a reversioner. The estate, too, was of copyhold tenure, and to construe it a present demise would have been to create a forfeiture; which the parties had cautiously guarded against by an express stipulation to procure a license when the estate should come in possession.

Doe v. Clare, 2 T. R. 739.||

[Articles of agreement were drawn in the following manner: "Articles of agreement between T S and D J, entered into in regard to his fulling-mills, dry-salting mills, and other conveniences for carrying on the said trades: that the mills and conveniences, with the islands and acre of land mintsfeet, called Ashacre, *he shall enjoy* and *I engage to give him a lease in*, for the term of 31 years from Whitsuntide, 1784, at the rent of 110*l.*: and that I will purchase one yard in breadth to be laid to the Race from the High Clews, the length of Charles Close: and that if it be bought," &c. Here, though the words *shall enjoy* are sufficient to give the legal interest, yet the latter words restrain their operation, and clearly show that it was the intent of the parties, that there should be some *further* assurance. It was in *fieri* at the time: and if a bill had been filed in a court of equity for a specific performance of the agreement, that court would not have told the party that he had a legal and executed contract, but would have decreed a lease according to the agreement. By the subsequent part of the agreement, the landlord was to acquire an additional piece of ground to be laid to the mill, without which the lease was not to be granted: this shows that there was to be some future instrument to give title to the party.

Roe v. Ashburner, 5 T. R. 163. So Doe v. Smith, 6 East, 530, S. P. and Tempest v. Rawling, 13 East, 18, S. P.]

{A entered into an agreement with B as follows: "Agreed this day to let to B my house situate, &c., at the yearly rent, &c. The above agreement to continue during my life, supposing it to be occupied by himself or a tenant agreeable to me. *A clause to be added in the lease* to give my son a power to take the house for himself, if he chooses, when he comes of age." The court, referring to the part of the agreement which stipulated for a clause to be added to the lease, were decidedly of opinion

that those words, importing that something ulterior the agreement was to be done by way of a regular lease, showed the intention of the parties to be that the writing in question should operate only as an agreement for a lease, and not as the lease itself. And Lord Ellenborough referred to Goodtitle v. Way, Doe v. Clare, and Doe v. Ashburner, (see *antè* 606, 607,) as having settled the point.

16 East, 530, Doe v. Smith. The principle of these cases applies equally to deeds relating to estates in fee. 1 Sid. 82; 1 Lev. 55, Foster v. Foster; 3 Johns. Rep. 388, Jackson v. Myers; Id. 424, Jackson v. Clark.}

β A memorandum of agreement to let, which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provide for the preparation of a future lease.

Warman v. Faithful, 3 Nev. & M. 137; 5 Barn. & Adol. 1042.

A memorandum having a lease stamp, by which A agrees to let B certain lands mentioned in an annexed abandoned lease, from A to C, upon the agreements, conditions, &c., of the abandoned lease, and by which A and B bind themselves to execute a lease similar to the abandoned lease, is itself a valid lease.

Pearce v. Cheslyn, 5 Nev. & M. 652.

Whether an agreement for a lease shall enure as a present demise, is a question of intention to be collected from the instrument.

Perring v. Brook, 7 C. & P. 360.

The parties had used a printed paper purporting to be a form for the demise of a farm; it had originally contained in the habendum words creating a tenancy from year to year, but these words were struck through before the execution of the instrument by the party charged. The remaining words of the demise were "for the term of one year fully to be completed and ended," and they stood immediately preceding those which had been struck out. Many subsequent stipulations remained in the lease which seemed applicable to a tenancy for a longer term than a year, or determinable by notice to quit. Held, that the words struck out might be looked at to ascertain the real intention of the parties in so erasing them, and consequently that the tenancy was for one year only; and, secondly, that the words inapplicable to such tenancy must be considered as struck out, or as surplusage.

Strickland v. Maxwell, 2 C. & M. 539; 4 Tyrw. 346.*g*

[Where a lessee of tithes agreed with the owner of lands for certain collateral considerations not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3*s*. 6*d*. per acre, this was adjudged to be no lease. 1st, The rent affected to be reserved is uncertain; under this agreement it is at the option of the party either to pay tithes in kind, or to tender the reasonable value of the tithes, which may be under 3*s*. 6*d*. per acre. And 2d, The owner of the lands, the person with whom the agreement is made, is neither to enjoy any thing, nor to pay any rent. It cannot therefore be a demise to him. The tenants are not parties or privy to the transaction: it cannot therefore be a demise to them. It can, at the most, amount to no more than a mere covenant with A that B shall enjoy, and creates no lease to either.

Brewer v. Hill, Anstr. 413.]

|| In a case of articles of agreement there was a stipulation, that out of the

rent therein mentioned, there should be a proportionate abatement in respect of certain premises to be excepted out of those demised; and that the tenant should hold at and under the usual covenants between landlord and tenant where the premises were situated: though there was no positive agreement for a future lease, yet, as there were strong circumstances of inconvenience if such an instrument should be considered as a lease, it was inferred to be an agreement only; for it might be disputed what were the usual covenants in the country where situated; and until the rent was apportioned for the excepted premises, it would be uncertain as to the rest, and, consequently, the lessor could not distrain.

Morgan v. Bissell, 3 Taunt. 65.‖

One made a lease for life, *et provisum est* that if the lessee die within 60 years, that then his executors and assigns should enjoy the land in his right for so many years as should be behind of the 60 years from the date of the lease: this was held to be only a covenant, and no lease, for which there are divers reasons assigned in the books; as first, because the words purport an agreement, and not a grant, and so sound only in covenant, which is a very unintelligible reason. Another reason given is, because if it should be construed a demise, it must be void, because there is no person *in esse* to take it; for the executors are not *in rerum naturâ*. Another reason given is, because nothing of the said term was given to the lessee himself for life, as remainder to him and his executors for 60 years. A fourth and last reason is, because there is no certainty either of the beginning or ending thereof, and therefore it cannot be a good lease. But a better reason than any of these seems to be, that he having in the first part of the deed made a lease in express and proper words, must be supposed to mean something less in this last part of the deed, which varies so widely in the form of expression, and which has a natural and proper meaning of its own as a covenant, but cannot amount or come up to a lease, without violence and force done to the words, as well as the intent of the parties. And this the rather seems probable, because Moore holds clearly, that if it had been provided that if the lessor die within 60 years, that then he demised the land to another (who was also a party to the deed) for so many of the 60 years as should be then to come; this would be a good lease; for here he comes into the very same form of expression made use of in the first part of the deed, which was an actual demise, and therefore must be supposed to mean the same thing in the latter part too, and, consequently, such words would make it an actual demise.

Dyer, 150; Co. 155; Hob. 35; Moore, 480; Roll. Abr. 848; Bendl. pl. 115.

A seised of lands in fee, by indenture, covenants with B, before Easter then next, to convey those lands by fine, or other assurance to B and his heirs, to the use of him and his heirs, with a proviso, that if A paid to B 100*l.* at the end of 13 years, that then he might re-enter, and all assurances should be to the conusor; and he covenanted and granted for him and his heirs, that B and his heirs should enjoy those lands till the end of the said 13 years, and for ever after, if the 100*l.* were not paid; and B covenanted to pay annually, during the 13 years, two capons, and that during the 13 years he would not commit waste; no assurance was made within the time: and if this, upon the whole deed, amounted to a lease for 13 years, was the question? And it was adjudged that it was no lease, but only a bare covenant, and this judgment affirmed in error; for

the intent of the parties was to make assurance of the inheritance by way of mortgage, and the covenant was only that he should enjoy the lands during the time of the mortgage, whether it continued 13 years only, or for ever; and if a fine had been levied, or a feoffment made, it is plain this deed had been no lease, but only a covenant to lead or declare the uses of such fine or feoffment; and though none was levied or made, yet the deed still continues of the same nature as it did at first, or as if such fine or feoffment had been actually executed; and the covenant on B's part, that he would do no waste, does not expound it otherwise, for that was only that he, being a mortgagee in fee, should do no waste, for which otherwise there would be no remedy.

Evans v. Thomas, Roll. Abr. 847; Cr. Ja. 172, S. C. affirmed in error. 2 Mod. 80, S. C. cited.

So, where one, by indenture enrolled, for money, bargained and sold lands to one and his heirs, provided, that if the bargainor for five years paid annually 10*l.* to the bargainee at the days limited in the deed, and at the end of the said five years shall pay 240*l.* then the bargain and sale to be void: provided also, and it is further covenanted and agreed between the said parties, that the bargainee, his heirs or assigns, shall not intermeddle with the actual possession of the premises, or the perception of the rents and profits, till default be made in the paymant of the said sums: this was held to be no lease to the bargainor for five years, but only in the nature of a lease at will, by reason of the negative words, that the bargainee should not intermeddle with the rents and profits for that time, and, consequently, so long was to leave the bargainor in possession as he was before.

Cro. Ja. 659; Palm. 201; 2 Roll. Rep. 241; Roll. Abr. 859, Pauseley v. Blackman.

So, where A acknowledged a recognisance to B of 200*l.* and B by indenture of defeasance did covenant, promise, and agree with the said A that if A, his heirs or assigns, should, after such a time, convey such an advowson to him and his heirs; and if the said B, his heirs, executors, &c., should and might at all times thereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said advowson, without the let, suit, trouble, &c., of the said A, or any other person or persons, &c., then the recognisance to be void; and the question was, if this last clause amounted to a lease of the advowson? The court was of opinion that it did not, for the intent of the parties was not to make a lease of it, but only a condition to defeat the recognisance; and this last clause should have relation to the estate in fee precedent, being, if the said A., his heirs, &c., which cannot be intended of a lease. And further, the clause is indefinite, at all times hereafter, and does not limit any certain time, for life or years, wherein the advowson shall be peaceably enjoyed, and therefore shall be intended during the estate in fee before mentioned. But no judgment was then given.

Co. Ent. 85 a. Bradston v. Buck. ‖ *Qu.* this case, I can nowhere find it.‖

If one makes a lease for life, and after grants that the lands or the reversion shall remain to another for 21 years after the death of the tenant for life, these words are sufficient to pass a reversionary interest by way of future lease without attornment, though there is not the word *demise*, or any other word usual or proper to describe a lease for years by; for here being words sufficient to prove a present contract for the reversionary interest of these lands after the estate for life determined, these, in case of a lease for

years, which is but a contract, are in themselves sufficient, and adequate to any other form.

Dyer, 124, pl. 40, 125, pl. 44; Plowd. 148, 150; Bro. tit. *Leases*, 71; Yelv. 85; Brownl. 136.

|| Where the tenant was in possession under a memorandum of agreement, whereby the defendant, as lessor, agreed to let a house on lease for twenty-one years, at the net clear rent of 63*l.* per annum, the tenant to enter at any time on or before a particular day, on paying the sum of 50*l.* on entry, and there was a purchasing clause in the lease; it was held, that this only amounted to an agreement for a future lease; and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

Duck v. Hunter, 5 Barn. & A. 322; and see 3 Dow. & Ry. 522; 1 Mann. & R. 137. See Hope v. Booth, 1 Barn. & Adol. 498.

Where A, by an agreement under seal, agreed to take and hire of B a certain house and premises, at a certain annual rent, but the instrument contained no words of demise, and there was nothing to show when the interest was to commence or determine; it was held no more than an agreement for a lease.

Clayton v. Burtenshaw, 5 Barn. & C. 41; 7 Dow. & Ry. 800.

Where a lease was granted to one, who afterwards took another into partnership, and both applied jointly to the landlord to enlarge the premises, agreeing to pay 10*l.* per cent. per annum on the money laid out, which was accordingly done, and the tenants afterwards dissolved partnership; it was held, that the agreement was only collateral to the lease, and not a new demise.

Hoby v. Roebuck, 7 Taunt. 157, S. C.; 2 Marsh. 433.

The following instrument amounts to a lease:—J T agrees to pay J W the sum of 140*l.* per annum in quarterly payments, for the house, &c., at, &c., for the term of seven, fourteen, or twenty-one years, at his option at the end of every seven years; the rent to commence on the 1st of January, 1827.

Wright v. Trezevant, 1 Moo. & M. 231.

Under a demise of a messuage, with all rooms and chambers, with the appurtenances thereto belonging, is to be understood all that is occupied together as an entire messuage at one and the same time; therefore, such a demise will not comprehend a room which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previous to the demise.

Kerslake v. White, 2 Stark. 508. By a lease of a tenement containing nineteen acres, except all timber, trees, wood, underwood, &c., six acres of the soil which at the time of the lease were covered with growing wood are not excepted, but pass to the lessee. Leigh v. Heald, 1 Barn. & Adol. 622.

Under a lease of premises, together with all ways appertaining, or with any parts thereof used or enjoyed, a right of way was held to pass, although not expressly mentioned, upon proof that it was used with the premises at the time the lease was granted.

Koystra v. Lucas, 5 Barn. & A. 830; 1 Dow. & Ry. 506; *sed* vide 2 Barn. & C. 96; 3 Dow. & Ry. 287.

Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be in-

troduced such lease must be construed as if that word were inserted, though the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.

Wight v. Dixon, 1 Dow, 141, 147.

One who had a term which expired on the 11th of November, let the premises, orally, from the 11th of September to the 11th of November for 270*l.* payable immediately. Held, that this was a lease of which parol evidence might be given, and not an assignment requiring writing.

Preece v. Corrie, 5 Bing. 24.‖

β The owner of a parcel of land sold a furnace and other buildings situated thereon, and subsequently leased to the purchaser his heirs and assigns, the land and water privilege on which the furnace stood, the purchaser covenanting to pay "the sum of ten dollars a year, so long as he should keep the furnace and buildings on the land, in full for the rent of the premises;" the furnace was suffered to go down, he however continued the payment of the rent, and one of the buildings was appropriated to another use. Held, that this was a lease for so long a time as the purchaser, his heirs and assigns, should keep the furnace and buildings on the land; and that it could not be terminated by the lessor, under those circumstances, until a reasonable time should have been allowed to the purchaser to rebuild the furnace, it not appearing affirmatively that he had abandoned it.

Cook v. Bisbee, 18 Pick. 527.

A contract was entered into between H, the owner of a farm, and M, by which the latter agreed that he and his wife should work for H one year, that M should labour on the farm and his wife perform the duties of housekeeper. M and his wife moved into a house on the farm, carrying with them their household furniture, and entered upon the performance of the contract. H afterwards becoming dissatisfied with M's conduct, ordered him to quit and leave the house, which he declined to do, whereupon H entered the house and put the furniture out of it. Held in trespass by M against H, that the contract between them did not create the relation of landlord and tenant, but only that of master and servant.

Haywood v. Miller, 3 Hill, 90.

As a general rule, whatever words are sufficient to explain the intent of the parties, that the one should divest himself of the property, and the other come into it for a determinate time, whether they run in the form of a license, covenant, or agreement, in construction of law will amount to a lease as effectually as if the most pertinent words had been used for the purpose. Therefore, an instrument entitled, "Articles of agreement," by which the plaintiff, the owner of a stone quarry, "let on a lease of six years," to the defendants who were stone cutters, "the privilege of quarrying and hauling away all the stone they might find use for during the said term of six years; held, to amount to a lease to the defendants, and to imply a covenant by the defendants to work the quarry.

Watson v. O'Hern, 6 Watts, 362.

An agreement to let "all that tract, &c., supposed to contain about twenty acres, more or less, now in the occupancy of A B," and A B occupies more land than twenty acres, lying on both sides of a line afterwards in dispute with the lessor, is a lease of all he is in possession of.

Hall v. Powell, 4 S. & R. 546.

A lease for no determinate period of time, by which an annual rent is reserved, payable quarterly, is a lease from year to year, so long as both par-

ties please. It will be considered for a year at a time till one of the parties gives notice to the other of an intention to determine it.

Lesley v. Randolph, 4 Rawle, 123.

A demise of a "barn" simply, without other words of description, will pass no more land than is requisite for the complete enjoyment of the barn.

Bennett v. Bittle, 4 Rawle, 399.

When the parties are silent in respect to matters of the demise, such matters are fairly open to explanation by the general usage and custom of the country, or of the district where the land lies.

Van Ness v. Pacard, 2 Pet. 148.

When the defendant, by letter, offered to take a lease for forty years from June next, of the iron and magnese ore, at a sleeping rent, and a royalty of 1*s.* per ton, and to work them in relative proportions together, as fixed by a competent person: to which the plaintiff replied, "I agree to the terms contained in your letter, and shall be ready to grant a lease conformable thereto from myself and all proper parties, whenever you require me;" held to constitute an agreement only, and not a demise.

Jones v. Reynolds, 1 Gale & D. 62. See Brashier v. Jackson, 6 Mees. & W. 549; Chapman v. Towner, 6 Mees. & W. 100.*g*

(L) What Certainty is requisite to Leases for Years as to their Beginning, Continuance, and Ending: And herein,

1. *With regard to the Date of the Lease.*

As to the date, it may be considered either as it is an impossible date, or an uncertain date; between which the general difference taken in the books, is, that if a lease be made to begin from an impossible date, there, the lease shall take effect from the delivery; because it could not be any part of the agreement between the parties, as from the 30th day of February, or the 32d day of April next. But, where the limitation is uncertain, as a lease in October, *habendum* from the 20th of November, without saying from November next following or preceding, or what other November; this uncertainty vitiates the lease itself, because it was part of the agreement, that the lease should begin from the 20th day of some November or other; but it not appearing to the court what November was intended, they cannot determine it for the parties, and therefore for such uncertainty the lease itself becomes void.

Mod. 180.

So, where a lease is made to begin from the nativity of our Lord God last past, without saying from the feast of the nativity, this lease shall begin presently; because it could be no part of the agreement between the parties that the lease should begin from the nativity itself, which is past so many hundred years ago; and therefore, for this impossibility of relation, the lease shall begin presently. But if it were to begin from the nativity of our Lord God generally, or from the nativity of our Lord God next ensuing omitting the word *feast*, Twisden was of opinion such lease should be void, for the uncertainty of its commencement. But Siderfin, in reporting the case, seems to be of a contrary opinion, and makes a *quære*, if it shall not begin presently? and, in truth, this seems the most reasonable opinion, for as to the impossibility of relation, there is the same in this as there is in the other; and therefore, by the same reason, it shall begin presently.

Sid. 461; Vent. 84; 2 Keb. 656. [In two of the cases put, the period of time at

which it is the intent of the parties that the lease should begin is manifest, and therefore in reason the leases ought to commence from such time. To suppose that they referred to an event which happened about two thousand years ago, or had in view an event which never will hapen, is to suppose them not in a capacity to contract.]

In ejectment, if plaintiff declares on a lease by J S, 20th August, for twenty years, *a festo annunciationis beatæ Mariæ Virginis ultimo præterito ante datum hujus indenturæ* or *indenturæ prædictæ*, where no mention is made of any date or indenture before in the declaration, this lease shall be taken to commence from the feast of the annunciation next before the 20th of August in that year wherein the declaration is; because it must have so commenced if the words *ante datum hujus indenturæ* had been omitted; and the addition of those words can be to no purpose, nor of any use, when no indenture at all is mentioned before, and therefore shall be void, or as if they had been totally omitted.

Roll. Abr. 849, Darcett's case; 850, Elme v. Leaves.

If a lease be made for thirty-one years, *anno* 1531, and after *anno* 1535, the lessor, reciting the said lease, by indenture makes a new lease in these words, *noveritis me dictis* 31 *annis finitis et completis dedisse et concessisse omnia præmissa* to J S, *habend. et tenend. a die confectionis præsentium* (*termino prædict. finito*) *usque ad finem termini* 31 *annorum tunc immediate sequentium plenarie complendorum;* this lease shall begin in computation from the expiration of the first lease for thirty-one years [and shall continue for thirty-one years] after such expiration of the first lease; for if it should begin from the day of the making of the deed, then there would be but four years thereof to come after the expiration of the first lease, which would be plainly against the intent of the parties; and therefore it shall be interpreted that the lessee shall have it for thirty-one years after the day of the date, and the expiration of the first term of thirty-one years, viz. after both. (*a*)

Roll. Abr. 849; Dyer, 261; Leon. 199; 3 Bos. & Pull. 404, S. C., Cited by Lord Alvanley. (*a*) || So held the Court of Common Pleas, but the Court of King's Bench came to a different decision; therefore Rolle adds, *Dubitatur. Curia de Banco contra Curiam de Banco Regis.*||

So, where lessee for a hundred years made a lease for forty years to B, if he should so long live, and after leased the same lands to C, *habend.* for twenty-one years from the end of the term of B, to begin and be accounted from the date of these presents; and the question was, if the lease to C should be said to begin presently, or after the term of B? The judges were clearly of opinion, that the lease to C should not be accounted from the time of the date, but from the end of the term of B, because by the first words it is a good lease in reversion in that manner; and then it shall not be made void by any subsequent words; or, as Coke said, the last words ought to be construed to give an interest as a future interest presently, and the actual possession after the expiration of the first forty years' term is well granted by the first words.

Godb. 166; Dyer, 261 b. in margin.

A man made a lease for years, to begin at the feast of our Lady Mary for twenty-one years, without showing in certainty at which of the feasts of our Lady, viz., the Annunciation or the Purification; yet Anderson held it a good lease, and that the lessee might determine the certainty of the beginning of the lease by his entry at which of the feasts he thought fit. But Periam doubted; and in truth this case seems within the rule before laid down to be void for the uncertainty of the time of its commencement.

Leon. 227, pl. 308.

(L) What Certainty is requisite to Leases for Years, &c.

|| A lease of lands by deed, since the alteration of the style, to hold from the feast of St. Michael, must be taken to be from New Michaelmas; and cannot be shown by any extrinsic evidence to refer to old Michaelmas.

Doe v. Lea, 11 East, 312.||

In ejectment the plaintiff declares upon a lease for years, *habend.* from the sealing and delivery, and declares that the sealing and delivery was 1° *Maii*, and the ejectment was the same day: it was moved in arrest of judgment, that the ejectment could not be supposed the same day, for the lease did not begin till the next day ensuing the sealing and delivery. But the court disallowed the exception; for where the lease is to begin from the time of the sealing and delivery, or generally to hold for twenty-one years next following, the ejectment may well be supposed to be the same day; for the beginning of the lease is presently upon the sealing and delivery; and therefore such a lease shall end the same time and hour.

4 Leon. 144, Highman v. Cook.

If an indenture of demise bears teste 4th May, 10 Jac. and is delivered 5th May, 10 Jac. *habend. a festo annunciationis beatæ Mariæ Virginis tum ult. prœterit., pro termino viginti unius annorum prox. sequent. datum dictæ indenturæ;* this lease commences in computation from Lady-day before the date, and in interest the fifth day, which is the day next after the date; and so all the words of the indenture shall take effect the 5th day, being the day of the delivery of the deed, and then the lease will determine on the feast of the Annunciation twenty-one years after; and therefore the count which was of such a lease, omitting *datum indenturæ*, was held to be well enough warranted by this lease found *in hæc verba*, the ejectment not being laid till the 5th of May.

Roll. Abr. 850; Hob. 18, Moore v. Hussey. [That a lease may commence at one day in point of computation, and at another in point of interest, is manifest from the case of Enys v. Donnithorne, 2 Burr. 1192, where it is holden, that a lease, *to hold from a day past for fifty years thence next ensuing, the said term to commence and begin from and immediately after the surrender, forfeiture, or other determination of an existing lease of the same premises*, was not uncertain in its commencement.]

In ejectment the plaintiff declared upon a lease made 14th Jan., 30 Eliz., from Christmas before for three years, and upon evidence the plaintiff showed a lease bearing date 13th Jan., the same year, and proved to have been then executed: and it was moved, for this variance between the declaration and the evidence, that the jury might be discharged; but Anderson, Ch. Just., said, that the evidence was sufficient to support the declaration: for if the lease was sealed and delivered 13th Jan. it was then a lease 14th Jan. *quod cæteri justiciarii concesserunt.*

4 Leon. 14, pl. 52, Price v. Foster.

If an indenture of demise bears teste 25th March, 15 Car., and is delivered the day of the date, and the *habendum* is from and after the day of the date of these presents, for and during the time and term of seven years from henceforth next and immediately following fully to be complete and ended; this lease begins in computation from the delivery of the deed, which was the day of the date, and in interest the next day after the date, and so all the words will have an operation; for it appears that the lessor was not to have the possession till the next day after the date, by the words *habendum* from and after the day of the date, which excludes the day of the date, but that the seven years should commence by computation from the delivery, viz.: from henceforth, which refers to the limitation of the seven

years; and therefore where the plaintiff declared on this lease by indenture dated 25th of March *habendum a die datus* for seven years, it was adjudged against him; for by computation it began *a datu indenturæ.*

Roll. Abr. 850, Cornish v. Cawsey.

If one makes a lease to A for twenty-one years, and after makes another lease to B for years, to begin *a fine et expiratione prædicti termini* 21 *annor. dimissor.* to A, and then the lease to A is determined, either by an express surrender, or by an implied surrender in law, as by A's acceptance of a new lease for life from the lessor, the lease to B shall begin presently. But, if the lease to B had been to begin *post finem et expirationem prædict.* 21 *annor.*, there the lease to B should not begin upon the surrender, forfeiture, or other determination of the first term to A till the twenty-one years actually run out by effluxion of time. The reason of which difference is, that in the first case the word term comprehends as well the estate or interest in the land as the time for which it is demised; and therefore the second lease being limited to begin *a fine et expiratione predict. termini* 21 *annor.*, whenever the term which includes also the estate and interest is determined, the lease to B shall begin; but in the other case the lease to B is not to begin till after the end and expiration of the twenty-one years, which cannot be ended but by effluxion of time.

Plowd. 198; Dyer, 177, pl. 35; Co. Lit. 45 b; Co. 154; Roll. Abr. 849; Leon. 106.

The bishop of Bath and Wells, 18 H. 8, made a lease in writing to A and B for sixty years; proviso, that if the said A and B die within the said term of sixty years, that then, after the death of the said A and B, and of the longer liver of them, it shall be lawful for the said bishop and his successors, to enter into the said lands: A dies; the bishop dies; and his successor, 22 H. 8, demises the said lands to C, *habend. cum post sive per mortem, sursum redditionem, vel forisfact. præd. B vacare contigerit*, for sixty years, with confirmation of the dean and chapter; and then B dies within the sixty years, and the grantee of the bishop would avoid this lease to C. 1. Because being limited to begin upon one of three events, viz.: death, surrender, or forfeiture, none of which happened, it could not begin at all; for it was not determined by the death of A and B, within the sixty years, as all the court agreed, but continued till the lessor or his successors entered; for so it was expressly provided by the lease, and that was a mere condition, and not a limitation; and then the second lease, as was argued, cannot begin at all, or at least the time thereof shall run on from the death of B the survivor. But it was adjudged the second lease was good; for it was not only limited *cum per mortem, sursum redditionem, &c.* the first lease should determine, but also *cum post mortem vacare contigerit;* so that this second lease may well begin when the first term by effluxion of time is run out *post mortem* of the parties. And this differs from a remainder limited to one after the death of another: there, it ought to begin immediately after the death, without any *interim;* but here, it shall not begin till after the first term run out *post mortem*, whenever in such manner *vacare contigerit*, and is a good lease presently in point of interest, to take effect in possession whenever the first lease, by any of these accidents, happens to be at an end, and is a good *interesse termini* in the mean time. And this construction ought to be made, to support the lease, because it shall be taken most strongly against the lessor, and for the benefit of the lessee.

6 Co. 34; Cro. Ja. 71, Bishop of Bath and Wells' case; Dyer, 312, pl. 89.

(L) What Certainty is requisite to Leases for Years, &c.

If A, reciting that B hath a lease for years of such lands, demises the same lands to C for years, to begin after the end or determination of the said lease to B; where in truth B hath not any lease at all of those lands, the lease to C shall begin presently; for in judgment of law, a void limitation and no limitation is all one. So, if he recites a lease which in construction of law appears after to be void, or misrecites a good lease in a point material, *habend.* from the end of the said lease, this new lease shall begin presently; though where the first lease is good in law, and only misrecited in a point material, the new lease can begin presently only in enumeration of years, not in interest, till the end of the first lease; for in these cases the commencement of this new lease, being referred to a thing which is not, cannot be any ways ascertained or governed thereby, and then it is as if no such recital had been, which would have left the lease to begin presently, as the strongest construction against the lessor, since there is nothing now to ascertain or determine its beginning at any other time.

Bendl. pl. 72; And. 3; Dyer, 116, pl. 70; Bro. tit. *Leases*, 62; Plowd. 148; Roll Abr. 849; Cro. Car. 399; Jon. 355; Miller and Manwaring; Co. Lit. 46 b; Lev. 77; Keb. 360; Basset v. Lewis, 2 Leon. 11, pl. 17; Vaugh. 73; 2 Lev. 242. [See Preston on Estates, ch. "Estates for Years."

So, where the queen-mother, having the inheritance of certain lands settled on her for her jointure, 14 Car. 1, reciting, that whereas Queen Eliz. 22d April in the 42d year of her reign, had demised those lands to such a one, &c., (whereas the lease intended was in truth 32 Eliz.,) the said queen-mother did thereby demise the said lands, to begin after the end or determination of the estate granted to the other *per literas patentes prædictas*, for 21 years; and the question upon this misrecital was, when the second lease for 21 years should begin? whether after the expiration of the first lease made 32 Eliz. though falsely recited to be made 42 Eliz.? or whether it should begin presently? It was adjudged, that for this misrecital the second lease should commence presently; and so the lessee was obliged to pay a rent of 60*l.* *per annum* for the whole 21 years, though he had nothing in the lands all that time. And this judgment given in C. B. was afterwards affirmed upon error in B. R. And in this case the court agreed, that if the date of the recited lease only had been mistaken, and the second lease had been of the lands, *habend.* after the expiration or determination of the estate or lease of the first lessee generally, in such case the second lease had been good, and should not have begun before; for then there had been sufficient certainty for the time of its commencement, and then *utile per inutile non vitiatur.* But here being limited to begin after the determination of the estate granted *per literas patentes prædictas*, where there were no such letters patent, and so the relation idle and null, the second lease begins presently, as if no such recital or relation had been; and there is no *utile* at all, for it is tied up to begin after a lease which is not. And as to Periam's opinion, that if I let lands to B, to begin after the expiration of a lease thereof, which I have made to J S, where in truth I have made no lease to J S, that the lease to B shall never begin; this was denied to be law, and against the current of all authorities. The court further said, the principal case here differs from Withers and Casson's case, where one made a lease for years, *habend. a festo purificationis*, and after by deed, reciting that he had made a lease to commence *a festo annunciationis*, granted the reversion to another, and that grant held good; for in the grant in the reversion the misrecital of the particular estate is not material in the

case of a common person, so long as he hath a reversion in him; but here in the principal case one term is recited to give certainty to the commencement of another, and is tied up by such precise words to begin after the determination of the lease granted by the said recited letters patent, that this cannot be referred to a lease that varies in the date, though agreeing in other circumstances, (which yet is not here, for the certainty of the term to B is not recited:) and though a lease is good without a date, yet when a lease is recited to be of such a date, a lease which bears another date cannot be said to be such recited lease; so that the lease here must begin presently; which, by the way, makes the grant good, either to pass the reversion with attornment, or being by indenture, to take effect upon the surrender, forfeiture, or other determination of the first term; and such recital makes no estoppel either against the lessor or lessee, or any claiming under them; or if it should, yet the jury are not estopped to find the truth; and then the court shall judge accordingly.

Lev. 234; Sid. 460; Vent. 83; 2 Keb. 322, Foot v. Berkely; Hob. 128; Vaugh. 82; Vent. 84.

And this rule, that if the former lease be misrecited in the date, &c., and a new lease made, to begin after the expiration of the said recited lease, that such new lease shall begin presently, holds as well in the lease itself as where the jury finds an indenture of lease, whereby it is recited, that the lessor made such former lease of such date, and under such rent, without finding it so in fact, but only by way of recital in the deed: such second lease shall in construction of law be adjudged to begin presently, though in the deed it is limited to begin after the expiration of the first lease so recited; because the jury do not actually find the first lease, but only a recital of it in another deed, which recital may be false, for ought appears to the court; and then the second lease shall begin presently, as if no such first lease were at all, since the not finding it effectually is as if there were none such made.

Vaugh. 73, 80, Rowe v. Huntington; Dyer, 93, pl. 28; 4 Co. 74, Palmer's case; Cro. Eliz. 603.

King Hen. 8, in the 31st year of his reign, leased lands to one for twenty-one years, and after granted the reversion to a bishop, who, reciting all the lands contained in the letters patent, and the land itself before leased, by name, and reciting the letters patent thus, that whereas H. 8, by his letters patent, dated 20 H. 8, where in truth they were dated 31 H. 8, and also misreciting the day of the date, grants all the lands, tenements, &c., to the first lessee for a certain number of years, *post expirationem hujusmodi literarum patentium:* in this case it seems, that the date being mistaken, and the commencement of the new lease referred to the expiration of the said letters patent, when in truth there were no such letters patent as were recited, the second lease shall begin presently, and so by acceptance thereof will amount to a surrender of the first. It would have been different, if the second lease had been limited to begin after the end of the first term generally.

2 Roll. Abr. 55, Halswell v. Ayleworth. *Dubitatur.*

|| Where there is a proviso in a lease that on non-payment of rent the term shall cease, the lessor and not the lessee has the option of determining the lease upon a breach made.

Reid v. Parsons, 2 Chit. 247; and see 2 Moo. 189; 8 Taunt. 241.

The express terms of a lease cannot be controlled by the custom of the

country; but if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time.

Webb v. Plummer, 2 Barn. & A. 746.‖

βBy an agreement bearing date 31st August, 1838, W agreed to let to R, and R agreed to take certain premises at a certain yearly rent, payable quarterly, "to commence from 29th September, next, and the first quarter's rent to become due and payable on the 25th December, next." Held, under this agreement that the tenancy commenced on the 29th day of September, 1838.

White v. Nicholson, 4 Scott, N. R. 707.

In general the day on which the demise is made is to be included in the term; a demise, therefore, made on the 1st day of January, to hold from year to year, the rent being payable quarterly, the first quarter's rent becomes due on the 31st day of March, and the lease expires on the 31st day of December.

Donaldson v. Smith, 1 Ashm. 197.*g*

2. *With regard to other Circumstances taken notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.*

As to other collateral circumstances taken notice of in the deed of lease in order to ascertain the commencement thereof, these are various according to the agreement of the parties.

Therefore, if one makes a lease for years to another for so many years as J S shall name, this at the beginning is uncertain; but when J S hath named the years, this ascertains the commencement and continuance of the lease accordingly, and in the mean time, if the lessee enters, he seems to be tenant at will. (But *quære* if by such entry before the commencement of the lease he is not a disseisor, as other lessees are who enter before their time?) But, if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination, because to every lease there ought to be a lessor and lessee; and here the nomination which ascertains the commencement not being appointed till after the death of the lessor, makes the lease defective in one of the main parts of it, viz., a lessor, and therefore, of consequence, must be void; which is also the reason that in the first case the nomination ought to be made in the lifetime of the lessor, and not by J S after his death, for then it will be void.

2 Leon. 86; Godb. 25; Co. Lit. 45 b; Co. 155; 6 Co. 35; Plowd. 6, 373, 524; Roll. Abr. 848.

If a parson makes a lease for so many years as he shall live, or the parson of D makes a lease of his glebe for so many years as he shall be parson there, these leases are said to be absolutely void, for the uncertainty of their continuance; because none can say how long the lessor will live, or be parson; and then it cannot be a lease for years, when by no possibility the number of years can be ascertained. But, if the lease were for twenty-one years, or any other certain number of years, if the lessor should so long live, or continue parson, or if J S should so long live, these are good, because the lease at first is certain for the determinate number of twenty-one years, though the death of J S may determine it sooner; and that is a common and usual limitation, and seems to have been introduced to obviate the objection of uncertainty in the other manner of leasing. But even in that case it should seem that the lessee will be

tenant at will, or if livery were made, will be tenant during the life or incumbency of the lessor, and so have the freehold in him, though for want of certainty in the number of years, he cannot be said lessee for years.

Co. Lit. 45 b; Roll. Abr. 848.

[This observation was referred to in a case in the Court of Exchequer where the chief baron, after acknowledging its justness, says, "But of rents or other things which lie in grant, the mere delivery of the deed has the same force as livery has in the case of land; and therefore any demise of uncertain duration gives an estate for life determinable on the particular event." A lease of tithes, therefore, "for all the time the lessor should continue vicar," was adjudged to be good without livery, and to convey an estate for life to the lessee during the incumbency of the lessor.

Brewer v. Hill, Anstr. 419.]

One made a lease of Blackacre to A for ten years, and of Whiteacre to B for twenty years, and after by indenture reciting both leases makes a lease to C of Blackacre and Whiteacre for forty years, *habend.* after the end or determination of the said several demises made to A and B, and then the lease to A of Blackacre determines; and if the lease to C therein should begin presently, or if C must wait the determination of the other lease to B likewise before his lease should commence, was the question? And, it was urged, that this lease should begin all at one time, and not have several commencements. But it was adjudged, that this lease to C in Blackacre should begin presently; for the *habend.* shall be taken *respectivè reddendo singula singulis,* viz., that the first lease of Blackacre to C for forty years shall begin presently after the determination of the first lease thereof made, and so for Whiteacre, when the first lease thereof determines: because every deed shall be taken most strongly against the lessor or grantor, and most beneficially for the lessee or grantee; the reverse whereof would happen in this case without such construction, and it would be against the plain intent of the parties to let in the lessor to the possession and enjoyment of the lands comprised in the first lease till the second lease, which had no relation thereto, were determined.

5 Co. 7; Moore, pl. 240; Cro. Eliz. 199; 2 Leon. 105.

In ejectment the plaintiff declared, that J S demised to him *per quodd. scriptum obligatorium* such lands, *habend. a die datûs indenturæ prædict.;* on not guilty, pleaded, it was found and adjudged for the plaintiff in Ireland: and it being assigned for error here, that there was no time specified when this lease should begin; for it was *habend. a die datûs indenturæ prædict.*, and no indenture was mentioned before, but only *scriptum obligatorium;* it was resolved, that the writing should be intended an indenture, though improperly called *scriptum obligatorium;* for every deed obligeth; or if it should not be intended an indenture, then it begins presently, as if it had been from an impossible limitation, as the 40th of Sept. or such like.

Vent. 137; 2 Keb. 796, Taylor v. Fitzgerald.

Copyhold land was granted to A, B, and C, for their lives *successivè;* and then the lord grants and demises the said land to D for forty years, after the death, surrender, forfeiture, or other determination of the estate to A, B, and C; then A and B die, C marries, and dies; and his wife holds herself in for life by the custom, as her free-bench, and dies; and if the lease for

forty years should commence from the death of the husband or the wife, was the question? for if it should begin from the death of the husband, it would be now ended, and so the ejectment not maintainable; if from the death of the wife, there would be yet twenty years of the lease to come. And *per curiam*, though the law will in general supply these words, *which should first happen*, so that the lease should begin upon the death, forfeiture, surrender, or other determination, which should first happen, yet in this case it shall not begin till after the death of the wife, for that is the first effectual determination thereof: for it does not determine to any purpose by any of the other ways, since the wife is in, in continuance of her husband's estate, for life; and it cannot reasonably be intended that this lease should begin during the continuance of the precedent estate, which by possibility may continue longer than the forty years; for the wife may outlive the forty years, and then the lease for forty years from the death of the husband would be void.

Lev. 20, Chantrell v. Randal; 2 Sid. 165, S. C., by the name of Clerk v. Candle. [Adjourn. according to both reporters.]

So, in a late case, where B had a lease of twenty-one years of copyhold lands, to commence after the determination of the estate which A at that time had therein, and the widow of A being entitled to her free-bench, and happening to outlive her husband twenty-one years, it was held by my lord chancellor, that the estate of the wife was only an excrescence of her husband's estate, which did not determine till the wife's death, at which time the lease made to B should commence, and continue for twenty-one years.

Mich. 6 Geo. 2, *in Canc.*, Irish v. Hook.

3. *The Certainty of Leases for Years as to their Continuance.*

As to the certainty of leases for years, as to their continuance, this ought to be ascertained either by the express limitation of the parties at the time of the lease made, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof, otherwise they will be void.

Plowd. 271, Say v. Smith and Fuller.

Therefore, where a man made a lease for ten years, and granted that if the lessee, his heirs or assigns, should pay to the lessor or his assigns, such a parcel of tiles at the end of every ten years next ensuing, that then he, his heirs or assigns, should have a perpetual demise of the premises from ten years to ten years continually following, and out of the memory of man; this was held to be a good lease but for ten years certain; because for all the years to come it was uncertain, (besides the repugnancy and nonsense of the words *extra hominum memoriam;*) for the payment of the tiles was to precede all the ten years that ever should be, and so must last to the end of the world, before any second ten years, by virtue of the lease, was to begin; and then to be sure there could be no ten years at all; and so all the other ten years, being to begin upon an impossible condition precedent, can never take place at all, but are absolutely void and idle.

Plowd. 271.

If A lets lands to B for so many years as B hath in the manor of D, and B hath then a term for ten years in that manor, this makes A's lease to him good, and fixes the measure and continuance thereof, so that B shall have the lands demised for ten years. So, a lease to one during the mi-

nority of J S, who is then ten years of age, is a good lease for eleven years, if J S so long live; for if he die sooner, that determines the lease, since nothing appears to extend it beyond his life, and his minority ceases by his death.

Co. Lit. 45 b; 6 Co. 35; Plowd. 273; Roll. Abr. 849; 3 Co. 19; Plowd. 522.

If I have a rent of 20*s.* *per annum* in fee issuing out of Blackacre, payable annually at the feast of Easter, and I grant that rent to another till he shall have received of the same rent 21*l.*, the grantee shall have the rent for twenty-one years certain, because the land is a certain security for 20*s.* *per annum*, which will take up twenty-one years certain to answer 21*l.*, and therefore so long the grant of the rent shall have continuance.

6 Co. 35 b; Plowd. 273; Co. Lit. 42 a.

But, if a man lets lands of the value of 20*s.* *per annum* till 21*l.* be levied of the issues and profits, this is but a lease at will without livery, because it is uncertain whether the land will be every year of an equal value; and though livery should be made, whereby he will have a lease for life, or a freehold estate, yet this will be determinable upon the 21*l.* levied; for by the original contract he was to have it no longer than till the money levied.

6 Co. 35; 3 Leon. 157; Bro. tit. *Lease*, 67; Co. Lit. 42 a; 3 Bulstr. 100; Plowd. 273.

If a woman be *ensient* with a son, and a lease be made till such issue *in ventre sa mere* shall come to full age, this is a lease only at will, and cannot be any lease for years; because it is uncertain when or whether ever the son will be born, and, consequently, the beginning, continuance, and ending of this lease is uncertain; and therefore it cannot be said any lease for years, since it is to begin presently as a lease: and yet nothing appears in the deed itself, nor is there such a reference to any collateral circumstance as may then measure the continuance thereof.

6 Co. 35.

If A seised of lands grants to B that when B pays to A 20*s.* that thenceforth he shall have and occupy the lands for twenty-one years, and after B pays the 20*s.*; this is become a good lease for twenty-one years from the time of such payment made; for though the commencement of it was contingent and uncertain, and depended upon B's election to pay the 20*s.*, yet after he had paid them, this takes off all uncertainty, and fixes the commencement and continuance of the lease.

Co. Litt. 45 b; 6 Co. 35 a; Roll. Abr. 849.

If one makes a lease to J S for twenty years, if the coverture between A and B shall so long continue, this is a good lease for that time *primâ facie*, though the dissolution of the coverture may determine it sooner. And there also it seems, that a lease to one generally during the coverture between A and B is a good lease: but this surely can be no other than a lease at will, for the uncertainty how long the coverture will continue takes off from any certainty in the number of years that can be affixed to such lease; and, consequently, it cannot be esteemed any lease for years, more than where it is for so many years as the lessor shall live, or continue parson, &c.

Plowd. 273.

If one lets lands for one hundred thousand days, this by Bro. is a good lease for that time, because the measure and continuance thereof by days is as certain as it would be if it were for so many years as comprehend those

days, since days are part of and go to make up the years; though it should seem that this cannot be properly called a lease for years, because the years are only an accidental circumstance in the enumeration of the days, not any part of the original contract between the parties.

14 H. 8, 13; Bro. tit. *Lease*, 13.

If a man makes a lease for years, without saying how many, this shall be a good lease for two years certain, because for more there is no certainty, and for less there can be no sense in the words.

6 Co. 35, 36; Bro. tit. *Lease*, 13. β A demise from A to B, for the term of his natural life, may inure either as a demise for the life of A or of B, according to circumstances. Doe d. Pritchard v. Dodd, 2 Nev. & M. 838; 5 B. & Adol. 689.*g*

If one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words void for the repugnancy by Bro. But, if one lets lands at will for a year, *et sic de anno in annum*, this is a lease only at will by the first words, and the last words being repugnant shall not control them, or add any more certainty to its continuance.

Bro. tit. *Lease*, 13, 22; 14 H. 8, 13 a.

If a man leases lands for such a term as both parties shall please, this is but a lease at will, because what that term will be is utterly uncertain; and the pleasure of the parties seems to be limited to attend the continuance as well as the commencement and first fixation thereof.

2 Roll. Abr. 851; 6 Co. 35 b. {Leases at will, according to the strict legal meaning of a lease at will, have now almost a merely nominal existence. The courts have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, and have held them to be tenancies from year to year so long as both parties please; especially where an annual rent is reserved. 2 Bl. Com. 147; 3 Burr. 1609, Timmons v. Rowlinson; 2 W. Black. 1173, Roe v. Lees; 1 Term, 162, Right v. Darby; 1 Johns. Ca. 38, 236, 2 Cain. 174, Jackson v. Bradt; 1 Johns. Rep. 322, Jackson v. Bryan. A parol lease for more than three years inures as a tenancy from year to year, though the statute of frauds enacts that such leases shall have the effect of estates at will only. 8 Term, 3, Clayton v. Blakey. Vide 1 Johns. Ca. 33, Jackson v. Rogers; 2 Cain. Er. 314, S. C.}

A parson made a lease of his rectory to one for three years, and so from three years to three years, and so from three years to three years during his life; or, as it is in Rolle, for three years, and at the end of those three years for other three years, *et sic de tribus annis in tres annos* during the life of the lessor. The whole court held it clearly a lease for twelve years; but by Dodderidge, if the lease had been for three years, and so from three years to three years, and so from the said three years to three years; this had been but a lease for nine years, because the words *from the said three years* tie up the relation retrospectively to the three years last mentioned, which made in all but six years, and then there are but three years more added, which make the whole but nine years; and for the words, (*during the life of the lessor*,) they cannot enlarge it to any further certain number of three years, by reason of the uncertainty of the lessor's life; and therefore, beyond the twelve years, or nine years, it amounts only to a lease at will, unless livery were made, which must necessarily pass a freehold determinable upon the lessor's death.

3 Bulstr. 158; Roll. Rep. 187; 2 Roll. Abr. 850; Dyer, 24.

And yet in one book where a lease was made for three years, and after the end of those three years for other three years, *et sic de tribus annis in tres annos* during the life of the lessor; this was held to be only a lease for nine years, because the words *et sic de tribus annis* shall be referred to the three years last mentioned; for otherwise these words would

exclude the three years next after the six years, and make the three last years to begin after nine years, and so make a chasm in the lease, by shutting out the three years next after the six years, so as for the three last years it should be only a future interest. Which case seems to be of a new stamp, and to thwart the preceding case, as to the resolution of its being a lease for twelve years; and there Jones and Wild held, that a lease *a tribus annis in tres annos* was but a lease for three years to commence *in futuro.*

3 Keb. 760, 768, Ferringham v. Graves.

Error of a judgment in ejectment at Lancaster, where the case on a special verdict was this: The college in the time of Queen Eliz. reciting a lease made by them 1 E. 6, demised to one Trafford for twenty-one years rendering 20*l. per ann.* rent, *habendum* from the end of the said term, made in the time of E. 6; and then follows a condition of re-entry for non-payment of the rent, and after that a covenant and grant, that after the said twenty-one years ended the lessee shall have the land for other twenty-one years, and so from twenty-one years to twenty-one years, till ninety-nine years are past, *Thence next ensuing shall be complete and ended;* and it was found that there was no lease made in the time of E. 6, and that since the date of the lease made in the time of Queen Eliz. more than ninety-nine years are passed, but that computing from the end of the term for twenty-one years, ninety-nine years are not yet come; so that the question was, whether the lessee shall have ninety-nine years only, reckoning as from the time of the date of the lease *tempore Eliz.* or ninety-nine years over and above the first twenty-one years? for it was agreed, that though no number of twenty-one years will centre in ninety-nine, yet the term shall last for ninety-nine years, which is a certain term, and the odd years shall be rejected. And it was adjudged at Lancaster, that the lessee shall have ninety-nine years besides the first twenty-one years, which shall not be accounted parcel of them, and that by reason of the word *thence;* for if it should be from the making of the lease *tempore Eliz.* it would be *hence*; but *thence* is a word which denotes another time, not the present time, and so *thence* must refer to the making of the first twenty-one years, because there is no other time to which it can refer, there being no lease at all 1 E. 6, to which it can refer, and so the term is not yet expired. And of that opinion was the whole court, and the judgment was affirmed.

2 Lev. 241, College of Manchester v. Trafford. [2 Show. 31, S. C. reports it a lease for twenty-one years to the same person, and after in the same lease a covenant that the lessee shall have the lands for twenty-one years more after the expiration of the said term, and so for twenty-one years until ninety-nine years be complete and ended; and adjudged good, and to be two leases, and not one, viz., for twenty-one years, and also ninety-nine years besides.—But Levinz was of counsel for the plaintiff in both courts.]

If a man makes a lease for a year, and so from year to year, *quamdiu ambabus partibus placuerit*, this is a lease for two years certain at least; and at most, after three years, this is but an estate at will: so, if a parson makes a lease for a year, and so from year to year as long as he shall continue parson, or as long as he shall live; this is a lease for two years at least, if he lives and continues parson so long; and after the two years, or at most after three years, but an estate at will for the uncertainty, unless livery be made.

Plowd. 273; Co. Lit. 45 b; 6 Co. 35; Cro. Ja. 308; Bulstr. 215; Roll. Abr. 851; Lev. 46; 2 Jon. 5; Lutw. 214. β Payment of rent is *primâ facie* evidence of a

tenancy from year to year. Doe d. Pritchard v. Dodd, 2 Nev. & M. 838; 5 B. & Adol. 689.*g*

One made a lease for three years, and after for three years, and so from three years to three years until ten years be expired: this was resolved to be a lease but for nine years; and that the odd year should be rejected, because that cannot come to fall within any three entire years according to the limitation, which in this case is to be taken all together as one year, else so much of the limitation, as cannot come within that description, must be rejected. And this seems to agree with Brook and Plowden, who in general hold a limitation in that manner from year to year for forty, fifty, or one hundred years to be a good lease for the whole term, because this is no such break of an odd year, at the latter end of the lease, as there is in the other case.

Noy, 143; Roll. Abr. 850; Bro. tit. *Lease*, 49; Plowd. 273, 522 a; 2 Co. 23; 2 Lev. 242.

One made a lease *de anno in annum, quamdiu ambabus partibus placuerit:* this was agreed by all to be a lease certain for two years: but there the lessee entered and occupied for two years, and also for part of the third year, and then died; and for rent arrear for part of the third year debt was brought against his executors; and upon *nihil debet* pleaded, and verdict for the plaintiff, it was moved in arrest, &c., that after the two years, this being a lease at will determined by his death, and then no action lies for the rent of the third year; and of this opinion was Popham. But it was held by Gawdy and Fenner, that though at first this was a lease certain but for two years, yet when he occupied part of the third year, this was then become a lease certain for that year also, so that neither of them could avoid it; for otherwise, after that the lessee hath been at great charges in manurance, the lessor, by a determination of his will, might strip him of all his profit.

Cro. Eliz. 775, Agard v. King; Mod. 3; Sid. 423; 2 Keb. 543, Gostwick v. Mason; Keilw. 63.

A parol lease was made *de anno in annum, quamdiu ambabus partibus placuerit;* it was adjudged that this was but a lease for a year certain, and that every year after it was a springing interest, arising upon the first contract and parcel of it; so that if the lessee had occupied eight or ten years, or more, these years, by computation from the time past, made an entire lease for so many years; and if rent was in arrear for part of one of those years, and part of another, the lessor might distrain and avow as for so much rent arrear upon one entire lease, and need not avow as for several rents due upon several leases, accounting each year a new lease. It was also adjudged, that after the commencement of each new year, this was become an entire lease certain for the years past, and also for the year so entered upon; so that neither party could determine their wills till that year was run out, according to the opinion of the two judges in the last case. And this seems no way impeached by the statute of frauds and perjuries, which enacts, that no parol lease for above three years shall be accounted to have any other force or effect than of a lease only at will: for at first, this being a lease certain only for one year, and each accruing year after being a springing interest for that year, it is not a lease for any three years to come, though by a computation backwards, when five or six or more years are past, this may be said a parol lease for so many years; but with this the statute has nothing to do, but only looks forward to parol

leases for above three years to come. And this opinion, in the principal case, seems to be confirmed by a like resolution of the court, where the plaintiff declared, that he retained the defendant *anno* 1657, for one year then next ensuing, and so from year to year, *quamdiu ambabus partibus placuerit;* and laid it, that *anno* 1661, the defendant withdrew himself from his service for a month, *per quod, &c.* And the court held, that though the retainer at first was for a year certain, yet after every other year begun, the retainer held for that year also, and gave judgment for the plaintiff.

Hill. 7 Ann. in B. R., Legg v. Hackett; 2 Salk. 414, pl. 6, S. C., by the name of Legg v. Strudwick; 2 Keb. 16.

And yet there are other cases in which it seems to have been held, that a lease made *de anno in annum, quamdiu ambabus partibus placuerit,* is a lease for two years certain at first, and after a lease for every several year that the lessee holds on; and that if upon such lease three years' rent be in arrear, the declaration must be of several leases for so many years as were past. And it is held, that to oust the lessee there must be half a year's warning given,(*a*) ending at the expiration of the year; and that unless such warning be given, it will be evidence of an agreement to hold for another year.(*b*) However, it appears from all the cases, that there is yet no uniform, unanimous opinion settled as to this matter.

2 Salk. 413. [A lease was granted "to hold from Michaelmas-day for one whole year, and so for two or three years, or any such further term of years as the parties should think fit and agree, on yielding and paying for the said one year, and from thence yearly and every year during such term or terms as should be thereafter granted, 35*l. per annum.*" According to Wilson's report, this was adjudged to be a lease for *two* years. Harris v. Evans, 1 Wils. 262. But according to Ambler, who was of counsel in the cause, it was holden to be a lease for *one* year only without a subsequent agreement; for if it had been doubtful under the words of the *habendum*, those under the reservation fully explained them. Ambl. 329. If we suppose the court to be alluding to different periods of time in these reports; in the former, to the time past, to the time the tenant had actually occupied; in the latter, to his estate at the commencement of the lease; both reports may be correct, and there will be no contradiction between them. For it is now clear that a lease *for a year, and so for such further term as the parties shall agree upon*, or, *from year to year, as long as both parties shall please*, is, with a view to its present extent, a lease for a year certain, and no more; though with a view to the time which has elapsed, to the number of years the tenant has occupied, it is considered as an estate for all that time including the current year. In the case of Agard v. King, *supra*, where the court are made to say, that such a lease was a lease certain *at first* for *two* years, it is to be remembered, that they were not considering the present, but the past estate which the tenant had: what they say therefore must be taken to be with reference to that, and to import nothing more than that it was at first, that is, upon the expiration of the two years, a lease for those two years, whatever it might be as to the third year which the tenant had entered upon, and upon which only the question in that case arose. And so in the case of Bellasis v. Burbridge, referred to in Salk. 413, and fully reported in Lutw. 213, the lessee under a demise for a year, and so from year to year, &c., had occupied one year, and part of another; and the court say, that this was a good lease for two years at least; that is, that the tenant having continued the occupation part of another year, the lease was thereby become a good lease for that year; not that the lease by the terms of it was originally and in its creation a lease for two years certain.—And notwithstanding the puzzle and contrariety of opinion in the books with respect to these running leases, the law is now considered as settled agreeably to the case of Legg v. Hackett or Strudwick, above reported. They are leases for one, two, or more years, according to the form of the lease, dependent for their further continuance upon the will of the parties. If it be the will of the parties that they should have a further continuance (and that such is their will, the law will presume, unless the contrary be evidenced by a regular half-year's notice to quit given by the one to the other,) the tenant so continuing in possession is not a mere tenant at will, but a tenant for years: it is the will of the parties that he should continue the tenancy another year:

his precarious interest is for such further term become certain; but he has still the same kind of estate which he formerly had. Birch v. Wright, 1 T. R. 380; Prest. on Estates, ch. Estates for Years. {See 4 Cran. 302, Alexander v. Harris. In Denn v. Cartwright, 4 East, 29, it was decided that a lease *not for one year only but from year to year* was a good lease for two years certain at least, and could not be determined at the expiration of the first year by six months previous notice to quit.} (*a*) 1 T. R. 162. (*b*) But this notice may vary according to the custom of the country, and the nature of the hereditaments in lease. Co. Lit. 270 b, note 1, 14th edit.; 2 Salk. 414; 3 Burr. 1609. If the letting be originally for a month or week, a month's or week's notice will be sufficient. But, where there is a clear tenancy from year to year, the notice must be half a year, not six months, at the least, and determinable with the year. 1 T. R. 162; Espin. N. P. C. 94, 267. This notice being required for the sake of convenience, extends to a tenancy in houses as well as in lands; it may be waived by the party giving it; or it may be wholly dispensed with by the consent of both parties. But no collateral considerations, such as a reservation of the rent quarterly, shall be construed to be a dispensation with it. What shall be a waiver of a notice is a question of fact to be determined by the conduct of the party who has given it. Vide Shirley v. Newman, Espin. Ca. 266; Oakapple v. Copous, 4 T. R. 361. The receipt of rent due after the expiration of the notice, *eo nomine* as rent, or the taking of a distress for such rent, have both been holden to be a waiver of it. Goodright v. Cordwent, 6 T. R. 219; Zouch v. Willingale, 1 H. Bl. 311.] ‖An instrument to operate as a dispensation with a proviso in a lease by deed for determining the lease at the option of the parties must be under seal; for it is in the nature of a release, and a release of that which is under seal cannot be effected by an instrument not under seal. Goodright v. Mark, 4 M. & S. 30.‖ [Where the tenant denies the right of his landlord, no notice from the landlord is necessary. The tenant controverts the right out of which the notice is to arise: he disclaims the relation of landlord and tenant: it is an instant determination of the tenancy on his part.—Although a lease granted by a tenant for life under a limited power of leasing, if it exceed that power, is absolutely void, and therefore incapable of confirmation by the remainder-man; yet, if the remainder-man accept rent, as rent, after the death of the tenant for life, he thereby admits that the lessee is *his tenant*, and therefore entitles him to a notice to quit. Doe v. Watts, 7 T. R. 83. A tenant for life made a lease for years, to commence on a certain day, and died (before the expiration of the lease) in the middle of the year. The remainder-man received rent from the lessee, (who continued in possession, but not under a fresh lease,) for two years together, on the days of payment mentioned in the lease. This is evidence from which the court will presume an agreement between the remainder-man and the lessee that the latter should continue to hold from the day, according to the terms of the original demise: so that *notice to quit ending on that day* is proper. Roe v. Ward, 1 H. Bl. 97. The notice, except where the lessor means to proceed under the statute for double rent, need not be in writing; but, if it be in writing, a slight inaccuracy, where the intention of the party giving is apparent upon the face of it, will not vitiate it. Therefore, a notice delivered to a tenant at Michaelmas, 1795, to quit at *Lady-day which will be in the year* 1795," was holden to be good. Doe v. Kightley, 7 T. R. 63.]

One let a stable for a week for 8*s*. and so from week to week at 8*s*. a week, *quamdiu ambabus partibus placuerit;* this was held, at most, but a lease for three weeks certain, and for the residue at will; so that the lessee, at the end of the three weeks, was not punishable for negligent keeping of his fire, that being only an involuntary waste, wherewith lessee at will is not chargeable.

3 Lev. 359, Panton v. Isham.

β Defendant in possession, under a lease for fourteen years, assigned the lease to the plaintiff by way of mortgage, and then committed a forfeiture for which the lessor brought ejectment. At a meeting of all the parties it was then agreed that judgment should be signed in the ejectment, that the lessor should grant a new lease to the plaintiff, and that the latter should grant an under-lease to the defendant. The new lease was accordingly granted to the plaintiff, who then delivered the key to the defendant, saying, "Go on as usual, pay the money," (due on the

mortgage,) "and when you have done so, you shall have an under-lease." Held, that this did not constitute the defendant tenant from year to year.

Doe d. Rogers v. Pullen, 3 Scott, 245; 2 Bing. N. R. 749.*g*

[A lease was granted for seven, fourteen, or twenty-one years, as the lessee should think proper. And by Lord Mansfield, this was at least a lease for seven years; then if the lessee continues, it is for fourteen years; if at the end of that time he still continues, it is for twenty-one years. And agreeably to this decision, it hath been lately determined, (*a*) that a lease for three, six, or nine years, determinable in 1788, 1791, 1794, is a lease for nine years, determinable, according to the opinions thrown out by two of the judges at the time of giving judgment in this case, by either of the parties at the end of the first three or six years, on giving reasonable notice to the other.

Ferguson v. Cornish, 2 Burr. 1032, more accurately in 3 T. R. 463. (*a*) Goodright v. Richardson, 3 T. R. 462.] {But it has since been settled that it is not determinable by *either of the parties*, but at the option of the *lessee only*. The opinion on that point expressed in Goodright d. Richardson v. Hall was extra-judicial. 7 Ves. J. 231, Dann v. Spurrier; 3 Bos. & Pull. 399, 442, S. C.; 9 East, 15, Doe v. Dixon.}

|| But, where no provision is inserted in such a lease for determining it at the will of either party, the option of deciding upon the alternative is in the lessee alone, upon the general principle, that every grant is to be construed most favourably for the grantee.

Dann v. Spurrier, 3 Bos. & Pull. 399, 442; 7 Ves. 231, S. C.; 17 Ves. 358; Doe v. Dixon, 9 East, 15.

Where a lease was made for seven years, with a proviso, that the lessee might determine it at the end of the first three or five years, giving six months' notice, and that after the expiration of such notice, upon payment of all rents and duties to be paid by the lessee, and performance of all covenants, until the end of the said three or five years, the lease should cease and be void; it was holden, that mere notice was not sufficient to determine the lease, but that performance of the covenants was a condition precedent to the determination of it.

Porter v. Shephard, 6 T. R. 665.

A proviso in a lease for twenty-one years, that if either of the parties should be desirous to determine it at the end of the first seven or fourteen years, it should be lawful for him, *his executors or administrators* so to do upon twelve months' notice to the other, *his heirs, executors or administrators*, was adjudged to extend, by reasonable intendment, to the *devisee* of the lessor, who was entitled to the rent and reversion. The intention was not to give a collateral power to be exercised by a stranger, but to annex certain privileges to the term and to the reversion, to pass with such term and such reversion respectively, and to be exercised by the persons respectively, whosoever they might be, to whom such term or reversion should come.

Roe v. Hayley, 12 East, 464.

Where in a lease for twenty-one years there was a proviso, that in case either of the parties, their respective heirs or executors should wish to put an end to the term at the expiration of the first seven or fourteen years, six months' notice in writing should be given under *his or their respective hands;* it was holden that a notice signed by two only of three executors of the lessor, to whom he had devised the freehold as joint-tenants in fee, expressing it to be given *on behalf of themselves and the other executor*, was not within

the terms of the proviso. It was further holden, that it could not be supported on the general rule of law, that one joint-tenant may bind his companion by an act done *for his benefit;* for it did not appear that the determination of the lease was for his benefit, the proof of which lay on the party who would avail himself of it. And it was further holden, that the notice being such as the tenant was to act upon at the time, no subsequent recognition of it by the third executor could make it good by relation; and that his joining in the ejectment was no evidence of his original assent to bind the tenant by the notice.

Right v. Cuthell, 5 East, 491.‖

4. *The Certainty of Leases for Years as to their Duration and Ending.*

As to this, though the preceding point may seem to have taken in all that can come in properly here, since the continuance of leases for years must show their determination likewise; yet there are some cases remaining which seem more proper to be inserted under this head.

Therefore, where a lease was made for forty years to two persons, if they lived so long, or to A for forty years, if he and B should so long live, or the lessor and lessee, or the lessor and J S should so long live; in all these cases the death of either of them determines the lease, because their lives are the collateral measure and limitation of the continuance of the term, or rather, the condition whereon the estate depends: and by the death of one of them, the condition is as much broken as if both were dead; since, with regard to the condition, both made but one person; and they cannot now both so long live, one being dead already; and the condition being entire, cannot be severed or divided, so as when part of it is broken and gone, the estate should still subsist and hang upon the other part thereof: and therefore, this differs from a lease to two persons for their lives, for this gives an estate to both for their lives, and both have an estate of freehold therein in their own right, and, consequently, this cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it. But Rolle seems to think, that where it is to two for 40 years, if they so long live, that this does not determine by the death of one of them, because it is an interest in both, which shall survive; but the other books are against it, because their life is but a collateral condition and limitation of the estate, which is broken when one dies.

2 Bendl. 2, pl. 2; 13 Co. 66; 2 Brownl. 292; 5 Co. 9; Cro. Ja. 78; 3 Bulstr. 131; Roll. Rep. 309, 310; 3 Leon. 10, pl. 150.

Upon articles of intermarriage between A and B it was agreed, that the defendant, father of A, should settle the lands in question upon C for his life, and after his death upon B for her jointure, with a proviso that C should make a lease thereof to the defendant for 99 years, if he and D his wife should so long live, which lease was made accordingly; then D dies, and if by her death the lease was determined, was the question between the defendant and the plaintiff, lessee of C? And the court, upon the first opening of the case, without argument, were all of opinion that it was, and gave judgment accordingly on the reasons of the foregoing case.

Vent. 74, Bailes v. Wenman, and vide 1 Brownl. 30; Mod. 187.

One made a lease for 40 years, if A his wife, or any of their issue, should so long live,; and it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason

of the disjunctive *or*, which goeth to and governs the whole limitation. But, if the words had been, if A *and his wife and issue should so long live*, there, clearly, by the death of any of them within the 40 years, the term had been at an end, by reason of the copulative *and*, which conjoins all together, and makes all their lives jointly the measure of the estate.

Moore, pl. 375; 3 Bulstr. 131, 133; Roll. Rep. 310; 2 Brownl. 292; Cro. Eliz. 269; Leon. 74, 244; Co. Lit. 225 a.

A lease was made for twenty-one years, if the lessee so long lived and continued in the lessor's service; the lessor dies: *per curiam*, the lease is not determined, because it was the act of God that he could serve no longer.

Cro. Eliz. 643; Noy, 70, Wrenford v. Gyles; 6 East, 534, n., S. C. cited by Lord Ellenborough.

A lease is made to two for years, with a proviso, that if the lessees die within the term, the term shall cease; they make partition, or one aliens his part, and dies, yet the lessor cannot enter into his part, but the assignee, or executors of the lessee, (if no assignment,) shall have that part during the life of the survivor, and there shall be no occupancy. For it is not like a lease made to two for term of their lives; there, if they make partition, and one dies, his part shall revert to the lessor presently. And if it had been to them for their lives *et eorum diutius viventi*, yet this would not have prevented the reverter upon such partition, *quia expressio eorum quæ tacite insunt nihil operatur;* and the partition breaks the joint tenancy, and defeats the right of survivorship, and so lets in the reversion *immediatè* to each one's single part. But in the principal case, the lease at first is general and absolute to both for so many years, which gives them a joint-tenancy in the term, and will carry it to the survivor and his executors; and then the proviso, which comes after, though it straiten it from going to the executors of the survivor, yet it does not give it to the lessor till both are dead within the term; and the partition or alienation breaks the joint-tenancy, and prevents the survivorship, and, consequently, none but the alienee, or executors of the lessee, can have that part during the life of the other lessee.

Dyer, 67, pl. 18; Co. Lit. 219; 3 Ass. pl. 8; 4 Co. 73; 3 Bulstr. 131; Roll. Rep. 310.

{A gave by will his tenant-right, which he held by lease, to A J, *but not to dispose of or sell it: and if he refused to dwell there, or keep it in his own possession*, then that J J should have his tenant-right of the farm. A J having borrowed money, left the title-deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution. A J left the premises and ceased to dwell there on the day of the execution before the sheriff entered. And it was held, that J J the remainder-man, was entitled to recover the premises from the purchaser, the estate of A J having determined by such his acts.

2 East, 481, Doe v. Hawke.

One leases for 21 years, if the tenant, his executors, &c., shall so long continue to dwell in the farm-house, and actually occupy the lands, &c., and not let, set, assign over, or otherwise depart with the lease. The continuance of this term depends on the lessee's actual occupation; and

(M) In what Cases an Entry by Lessee requisite, &c.

therefore if the lessee become bankrupt, and his assignees possess themselves of the premises and sell the lease, and the bankrupt is out of the actual possession and occupation of the farm, the lessor may maintain ejectment, without a re-entry.

8 East, 185, Doe v. Clarke.}

(M) In what Cases, and to what Respects an Entry by the Lessee is requisite to the Perfection of his Lease.

As to this it is to be observed, that at common law no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete till an actual entry by the lessee: for though the lessor had done all on his part to perfect the contract, so that he could not afterwards any way derogate from, or avoid it, yet, till there was a transmutation of the possession by the actual entry of the lessee, it wanted the chief mark and indication of his consent thereto, without which it might be unreasonable to adjudge him in actual possession to all intents and purposes; since it might so happen that such lease was made in his absence, and when he knew nothing of it, and perhaps might be greater than he would be willing to take; or the estate might be so encumbered as to bring a load upon him rather than any advantage. For these reasons (amongst others) the law would not cast the immediate and actual possession upon him *nolens volens;* and therefore it was, that till actual entry he could not maintain an action of trespass or ejectment, because those actions, complaining of an immediate violation of the possession, could not be proper for him who had no actual possession. But the lessor having done all that was requisite on his part to devest himself of the possession, and pass it over to the lessee, had thereby transferred such an interest to the lessee, as he might at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as he might before entry grant over to another, or, if he died before entry, would go to his executors; or, if the grant were made to two jointly, to the survivor and his executors; any of whom might enter at their pleasure, and so reduce the contract into an actual execution; for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power, and left to his own discretion to use when and as he thought fit. And therefore this differed from a lease for life, or a feoffment in fee; for these being estates of freehold must necessarily be executed by livery of seisin, which carried the immediate and actual possession to the lessee or feoffee, in as much as the operation of the livery could not be in suspense for the prejudice that might thereby accrue to strangers, who, after such solemn transmutation of the possession by livery, could take notice of no other tenant of the freehold, and therefore must necessarily bring their *præcipes* against him for recovery of their rights; which if they might after be defeated and eluded on pretence of any disagreement, or that there was no actual consent or agreement thereto, and so the actual possession not vested in him, would be greatly injurious to the rights of strangers. Besides that, the livery can be made to none but the lessee or feoffee himself in person, or some other person lawfully authorized by letter of attorney to receive the same; and therefore he can no ways be supposed ignorant of the terms upon which he took it, and so no such reason for suspending the actual execution of it. And therefore if a lease were made to A for life, the remainder to B for life, and then A died, a release to B and his heirs, before actual entry, would

be good to enlarge his estate, because he had the freehold in law in him immediately upon A's death to answer to the *præcipes* of all strangers, as fully as he could ever have it by any entry. But now in the case of a lease for years it is quite different, as has been shown; and therefore till actual entry, which is an agreement on his part, in case of such lease for years, equivalent to the acceptance of livery in case of the passing of a freehold, the lessee for years hath not the possession; and as he hath not the possession, so neither hath the lessor a reversion to grant either to the same lessee or a stranger. But yet if a rent were reserved on such lease for years, and before actual entry of the lessee, or commencement of his lease, the lessor should release to him all his right in the land; though this would not be sufficient to carry the reversion* by way of enlargement of his estate, yet would it extinguish the rent, because every deed must be taken most strongly against the grantor, and to be made to some purpose or other; and since this cannot operate on the estate to enlarge that, or carry any further interest to the lessee, yet it may well operate upon the rent which was issuing out of the land, and coming to the lessor, in respect of the land he had departed with, and therefore shall be construed to extinguish and determine that rather than it shall be totally void.

Co. Lit. 46 b, 51 b, 270 a; Plowd. 142 b, 423 a; 5 Co. 124 b; Cro. Ja. 61; 2 Mod. 249; 2 Vent. 203, 204. β The right of possession as to third persons, is in the lessor, until the contract has been consummated by the entry of the lessee. Sennet v. Bucher, 3 Penns. 392. *Vide the next clause.

And this way of executing leases for years, by an actual entry, was always held necessary at the common law, and for a considerable time after the statute of uses likewise, till the way was found out of conveying a freehold by a lease for a year and a release thereupon, according to the common form now used. For it being found troublesome and inconvenient to put the lessee under a necessity of making an actual entry in all cases before a release could be effectual thereupon to enlarge his estate, especially where the lands lay at any considerable distance from the place where the deeds were executed; therefore, to prevent this trouble and inconvenience for the future, they began to construe, that where the words and consideration were sufficient to raise a use, though it were but for a year, the statute would carry the actual possession after it, and, consequently, make the lessee equally capable of enlarging his estate by a release thereupon, as if he had actually entered by force and virtue of the lease: and the consideration, if it were valuable, though never so small, was looked upon to be sufficient for the raising of a use; and therefore 5*s.* or such other consideration, came to be the standard in a lease for one year, which in time grew to be a thing merely of course and form, it being seldom or never paid, though the lessee by his acceptance of the lease upon such consideration, was estopped to deny or aver against it. But because there were some opinions, that where a conveyance might inure two ways, either at the common law, or upon the statute, that there the common law should be preferred and take place; therefore, to bring the lease more effectually within the statute they likewise inserted the words therein *bargain and sell*, which, together with the consideration, were held even at common law sufficient to raise a use; and then the statute, which came after, carried the possession accordingly, without any actual entry made by the lessee; and so the conveyance by way of lease and release grew in time to be the most common and easy method of transferring a freehold or fee, and has now continued for several years, almost to the disparagement of conveyance by livery. And to bring the lease still more effectually

(N) When to take Effect as a Reversion, &c.

within the statute, it was afterwards used at the end of the lease to say, *That such lease was made to the intent, that by virtue of the statute of uses, the lessee might be in actual possession, and be thereby enabled to accept and take a grant and release of the freehold and inheritance thereof*, &c. 2 Mod. 251.

β Where demised premises were described in an indenture of lease by the number of the lot, and also by metes and bounds, applied to a different lot from that described by its number, and the tenant in the possession of the lot described by its number, and continued such possession for thirty-six years, it was held, that the practical location was evidence of a mistake in the latter part of the description, and that the lease was good and operative. Lush v. Druse, 4 Wend. 313.*g*

(N) Leases for Years, when to take Effect as a Reversion, when as a future Interest, and when neither the one nor the other.

If one, having made a lease for life or years to A of lands, after make another lease for years to B of the same lands, or of the reversion of those lands *habend.* the said lands, or the reversion of those lands, to the said B *cum post sive per mortem, resignationem, sursum redditionem vel aliquo alio modo vacare contigerit;* in this case B hath election to take such lease either as a reversion or a reversionary interest, if he can prevail for an attornment of A, the tenant in possession; or if not, yet as a future *interesse termini* such lease will be good to take effect in possession upon the determination of the first lease, be it by death, surrender, forfeiture, effluxion of time, or any other way. The reason whereof is, that when the lessor has expressly departed with, and made over an interest to the lessee for such a time, and this interest cannot take effect in possession, because the lessor himself had not the possession to give, but must therefore be carved and derived out of the reversion which the lessor had, the lessee *primâ facie* hath a reversion, or reversionary interest for the time, in the same manner as the lessor or grantor himself had; but then the perfecting such lease as a reversion, or a reversionary interest, to draw after it the rents and services, depending on the will and pleasure of the tenant in possession, whether he will attorn, and become tenant to such lessee or grantee, or not; if he thinks fit not to attorn, it cannot pass as a reversion or reversionary interest; yet this shall not totally invalidate and avoid such lease or grant, if by any other means it can be made good and become effectual; and this it may as a future *interesse termini*, to take effect in possession on the determination of the first lease, when or what way soever that happens; and therefore, as such, it shall take effect, rather than be absolutely void, when the lessor or grantor hath done all in his power to devest himself of the possession for so much a longer time. But then such second lessee hath an election to take it as a reversion, or reversionary interest only, when the lease is made to him by deed-poll or indenture; for if it were made by parol, then he can only take it as a future *interesse termini*, to take effect in possession upon the determination of the first lease, when or which way soever that happens, and not as a reversion, or reversionary interest, to draw after it the rents and services, because a reversion cannot be granted to pass without deed; for a deed is of the very essence of the grant of a reversion, or reversionary interest, and without it no reversion, or reversionary interest can pass out of the lessor. 6 Co. 36; Cro. Ja. 72; Cro. Eliz. 152; Leon. 171; 3 Leon. 17; 4 Leon. 23; Bro. tit. *Attornment*, 41, 60; Lit. § 576; Dyer, 26 a, 58, 124, pl. 40, 125, pl. 44, 178, 233,

pl. 10, 117, pl. 76, 350, pl. 18, 376, 377; Bendl. 286; Plowd. 148, 150, 151; Bro. tit. *Lease*, 71; Yelv. 85; Brownl. 136; 4 Co. 53; Dyer, 46.

And this introduces a threefold distinction in the manner of making such leases for years, where there is a prior lease or estate then in being: 1st. When they are made by parol. 2dly, When by deed-poll. And, 3dly, When by indenture or fine.

As to the first, if one makes a lease to A for ten years, and the same day makes a parol lease to B for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within the ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it; and the second lease being made the same day, and for no longer term than the first ten years, could not pass any interest as a future *interesse termini* certainly; for the first lessee had the whole interest during that time; and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void, for want of a power in the lessor to contract for it; and as a reversionary interest it cannot be good, for want of a deed; for a reversion, whether it be granted for life or years, not being capable of executing either by livery of seisin, or entry and transmutation of the possession, there can be no evidence of the creation or existence of such a grant, without a deed to ascertain it; and therefore a deed in such a case is as essential to the making good the grant, as livery of seisin or entry in the other cases, where they deal for the possession; and by consequence, this second lease not being good, either as a future *interesse termini*, or a reversion, must be absolutely void. But now if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years, for the reasons before given. For the last ten years it had been good; because when the first ten years were elapsed, the second lessee might then execute, and reduce into possession by entry, as well as if it had been at first made in possession; for it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore by its determination lets in the second lease. But as a grant of the reversion such second lease could not be good, for want of a deed, for the reasons before given; neither could any attornment help it, or let in the second lease till the first ten years run out by effluxion of time.

Plowd. 421 b, 422 b; Bendl. pl. 246; Cro. Eliz. 160; Plowd. 432, 521; Hutt. 105; Bro. tit. *Lease*, 48; Moore, 185, pl. 329; Dyer, 112, pl. 49.

But now, 2dly, If such second lease had been made by deed-poll, then it might well inure as a grant of the reversion, and draw after it the rents and services of the first lessee, if he would consent to attorn, and by consequence, whenever the first lease determined by surrender, forfeiture, or otherwise, such second lessee having the immediate reversion must come in for the residue of his term; but without such attornment to make it operate as a grant of the reversion, this second lease, though by deed-poll, would

be absolutely void, as if it were only made only by parol, because during the first ten years the lessor had no power to contract for the possession; and therefore if this grant could not take effect as a grant of the reversion, which was all the lessor had a power of, it must likewise be absolutely void. But, if such second lease by deed-poll had been for twenty years, then with attornment this would be a good grant of the reversion presently, to take effect in possession whenever the first lease determined; or if no attornment could be had, yet it would inure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol.

Vide the authorities cited above.

But now, 3dly and lastly, if such second lease for ten years had been made by indenture or fine, then this would have been good as a present lease, by reason of the estoppel to both parties by the indenture or fine, and therefore whensoever the first lease determined, the second lease should commence in possession; and in the mean time the second lessee, by reason of the estoppel, would be obliged to pay the rent reserved in an action of debt. And if such second lessee could prevail for an attornment; then this lease would inure as a grant of the reversion, and draw after it the rents and services of the first lessee, and would take effect in possession whenever that determined; but without such attornment, though the second lease would be good between the parties, by reason of the estoppel, yet not as a reversion; and therefore such second lessee could have no remedy for the rents and services of the first lessee.

Vide the authorities to the first distinction.

So, if one had made a lease for life, or for eighty years, if the lessee should so long live, and after, by indenture, let the same lands to another for years, to begin presently, and then the first lease determined by death, surrender, or forfeiture, the second lessee should have the lands in possession presently, for the residue of the years, because such second lease, by reason of the estoppel, took effect between the parties presently, and therefore shall come in possession whenever the first lease is out of the way. But, if such second lease were only by deed-poll, then there must be an attornment to make it good as a grant of the reversion, as there must likewise in the other case, where it was made by indenture; and without such attornment the second lease could only take effect in possession upon the determination of the first lease by the death of the lessee, according to the express limitation, and not upon any sooner or other determination by surrender, forfeiture, or otherwise: much less, if such second lease were by parol, could it take effect upon any other determination of the first lease: for though in these cases the first lease, depending upon the life of the lessee, was uncertain how long it would continue, yet so long as it did continue, the first lessee had the sole and absolute possession, and the lessor no power to contract for any thing but his own reversion during that time; and therefore if his second lessee cannot attain the reversion, the contract can take no effect for the possession till the death of the first lessee, because that being the lessors own limitation affixed to such lease, he cannot deal for the possession before that time comes; and therefore, no accidental determination of the lease sooner shall let in the second lessee, unless he can prevail for the reversion by attornment of the first lessee, in case of the lease by deed-poll, or unless in case of the indenture,

(O) Leases for Years by Estoppel, &c.

he shall, by reason of the estoppel, be let in whenever the first lease is out of the way, whether he obtained an attornment or not.

Co. 155 a; Cro. Eliz. 322; Plowd. 422 a, 433 a.

But in all the cases before mentioned, if such lease by indenture or deed-poll were by way of bargain and sale for years, then, it should seem, it would pass as a reversionary interest presently, without any attornment, by force of the statute of uses, and it being only for years, there would need no enrolment of the indenture or deed-poll.—And *note;* By the statute of frauds and perjuries, 29 Car. 2, c. 3, no parol lease for above three years is to have any other effect than only as a lease at will; so that such parol leases now for ten or twenty years are out of doors.*

3 Leon. 17; 4 Leon. 23; 5 Co. 113, Mallorie's case.

(O) Leases for Years by Estoppel, how far and against whom such Leases are good.

If one makes a lease for years, by indenture of lands, wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he having by indenture expressly demised those lands, is by his own act estopped, and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them, and, consequently, the lessee may take advantage thereof, whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease. And this estoppel by indenture is so mutual and reciprocal, that if a man takes a lease for years by indenture of his own lands, whereof he himself is in actual seisin and possession, this estops him during the term to say the lessor has nothing in the lands at the time of the lease made, but that he himself, or such other person, was then in actual seisin and possession thereof; for by acceptance thereof by indenture, he is, for the time, as perfect a lessee for years, as if the lessor had at the time of making thereof the absolute fee and inheritance in him. But, if such lessee of his own lands, being ejected by the lessor, should bring an ejectment, and the lessor should plead not guilty, and give the lease and some matter of forfeiture thereof, in evidence, to support his plea without pleading, and rely on the estoppel, and the jury should find the special matter, viz., that

*‖Mr. Preston, in referring to this chapter, says, the conclusion at which the author seems to arrive is, that a term granted by parol, by a person who has merely a remainder or reversion expectant on a term for years, will be void for such part of the time as is comprised in the former lease, and will be good for the remainder of the time. It is admitted, that the doctrine does not apply to those instances in which the prior estate is for life; and, it follows, any other estate of freehold. It is evident also that the author is not perfectly consistent in all the parts of this chapter. In one instance he treats the lease by parol as to take effect in possession, "upon the determination of the first lease, when or which way soever that happens," while, in a subsequent passage, he considers the second lease as incapable of effect, if the period of the first lease runs out by effluxion of time; and it is to be lamented that the author's doctrine is derived from the arguments of counsel in the case of Bracebridge v. Clowse, Plowd. 421, and not from any decision. The utmost extent of authority to be found among the cited cases is the opinion of Gawdy, J., Cr. El. 160, that so much of the second lease as comprises the same term as was included in the former lease is void in its inception. Perhaps it may not be too much to say, that this point deserves further consideration. It is difficult to understand why this lease cannot bind the possession in the hands of a lessor from the time the possession shall fall to him. 2 Prest. Conveyance, 149.‖

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the defendant had nothing in the lands at the time of such lease made, but that the plaintiff himself was then in actual seisin and possession thereof, whether the court, upon this verdict, are bound to adjudge according to the truth of the case, viz., that such lease by one who had then nothing in the lands was void; or if they are to adjudge according to the law, working by way of estoppel upon such lease by indenture seems a doubt upon all the books. But my Lord Coke lays it down for a rule, that the jury do well to find the truth, viz., that the lessor had then nothing in the lands; but then, upon such finding, the court is to adjudge, according to the operation of law upon the estoppel wrought to both parties by the indenture, that they are bound. But, if the jury, understanding that the lessor had nothing in the lands at the time of the lease made, and that therefore his lease could not be good in fact, but only by way of estoppel, and inferring from thence that they, who are sworn to say the truth, were not bound by such an estoppel, which was plainly against the truth, should therefore give a general verdict against the lease, that the defendant was guilty of the ejectment; in this case, says my Lord Coke, such jury are liable to an attaint. And this seems the better opinion; for though it be true that the jury are not bound by the estoppel, and therefore may find that the lessor had nothing in the lands at the time of the lease made, which is a truth of fact, the lessee is estopped to affirm, and is the only subject matter of the estoppel; yet the consequence of such estoppel, and how far the lease is made good thereby against the parties, is matter of law, and not of fact; and therefore if they take upon them, first, to find that the lessor had nothing in the lands at the time of the lease made, and then to find that such lease is void; or, which is all one, to find that such lease was void, because the lessor had then nothing in the lands, as the essential cause which induced them to find such lease to be void, or that there was no such lease; in this they take upon them to judge the matter of law, and in so doing exceed their duty, and, consequently, if they are mistaken, lay themselves open to an attaint; for, in truth of fact, there was such lease made, and, in truth of fact, the lessor had nothing in the lands at the time of making thereof; and all this is their duty, and belongs to them to find; but, whether such lease, so circumstanced, be good, or void, is matter of law for the court to adjudge upon these circumstances; and therefore, if they will take upon them to anticipate the judgment of the court, by giving their own judgment thereon, they must do it at their own peril, and if they mistake, be liable to an attaint.(*a*)

Co. Lit. 47, 227 a; Plowd. 434; 4 Co. 53; Cro. Eliz. 140; Sav. 98; Owen, 96; Leon. 206; Cro. Eliz. 362; Moore, pl. 323; 2 Brownl. 150; Cro. Car. 110; Roll. Abr. 871; Cro. Ja. 73. ‖ If to debt on a demise by indenture, the defendant plead *nil habuit in tenementis*, the estoppel need not be replied, but may be taken advantage of by demurrer. Palmer v. Ekins, 2 Ld. Raym. 1550; 2 Str. 817, S. C.; Kempe v. Goodall, 1 Salk. 277; 2 Ld. Raym. 1154, S. C.; Heath v. Vermeden, 3 Lev. 146. But, if the lessor reply *habuit* instead of demurring, and so put the fact of his having nothing in the premises in issue, the jury are at liberty to find the fact. Trevivan v. Lawrence, 1 Salk. 276.‖ (*a*) 4 Co. 53, Rawlins's case; Co. Lit. 47 b.

But, if such lease for years were made by deed-poll of lands wherein the lessor had nothing, this would not estop the lessee to aver that the lessor had nothing in those lands at the time of the lease made; because the deed-poll is only the deed of the lessor, and made in the first or third person; whereas the indenture is the deed of both parties, and both are, as it were, put in and shut up by the indenture, that is, where both seal and execute it

as they may and ought; for otherwise, if the lessor only seals and executes the indenture, the lessee seems to be no more concluded than if the lease were by deed-poll; for it is only the sealing and delivery of the indenture as his deed that binds the lessee, and not his being barely named therein, for so he is in the deed-poll; but that being only sealed and delivered by the lessor, can only bind him, and not the lessee, who is not to seal and execute it. And it should seem, that such lease by deed-poll binds the lessor himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem, he is bound by such lease by way of estoppel.

Co. Lit. 47 b; Roll. Abr. 871.

And yet it is generally said, that these estoppels ought to be mutual, otherwise neither party is bound by them: therefore, if a man takes a lease for years of his own lands from an infant or feme covert by indenture, this works no estoppel on either part, because the infant or feme, by reason of their disability to contract, are not estopped; therefore, neither shall the lessee be estopped, because all estoppels ought to be mutual.

Cro. Eliz. 37, 700; Co. Lit. 352 a.

So, if a man takes a lease for years of his own lands by patent from the king, rendering rent, this shall not estop the lessee, as an indenture between common persons in such case would do; because the king cannot be estopped; for it cannot be presumed the king would do wrong to any person, and therefore being deceived in his grant makes it absolutely void. And if he be not estopped, neither shall the lessee; because all estoppels ought to be mutual. But perhaps there may be some difference between these cases of a bare acceptance of a lease from such persons, as by reason of their imbecility, incapacity, or other impediment arising from their own persons, could not make such lease, but that the same was either absolutely void, or at least voidable, on their part; and therefore the lessee may show such incapacity to avoid them, as made by persons who wanted power or ability to contract; and so the whole contract must fail, not for want of a sufficient estate in the lessors, (for if they were of full age, and sole, &c., that would not be material,) but for want of a sufficient power or ability to contract. But, when such lease is made by a man of full age, though by deed-poll, why this should not bind and estop him as well as if it were made by indenture, seems hard to understand; for he hath executed it on his part, with the same solemnity; and though it cannot bind or estop the lessee, because he never executed it, yet why that should invalidate it on the lessor's part, whose deed it was, and who did all he could to bind himself, does not seem very intelligible. Besides that, the books, which put the case of the lease by deed-poll, saying only that the lessee is not estopped thereby, seem to allow that the lessor is notwithstanding estopped; for otherwise they would take notice of their being both at large, as they do in other cases.

Roll. Abr. 871.

If lessee for years accepts a lease for years of a stranger by indenture, who hath nothing in the reversion, this is a good lease by way of estoppel between them, and not a confirmation; for nothing appears that the lessor knew the lessee then had any thing in the lands, and then it is the same with the other cases, and works by way of a bare estoppel; but Fenner thought it a confirmation, against all the other judges.

Roll. Abr. 871, Style v. Herring.

(O) Leases for Years by Estoppel, &c.

If one lets lands to me, by deed enrolled, unknown to me, and brings debt upon the lease, I may say *ne lessa pas*, as Littleton held; but by all the justices, he who made such lease is concluded to say the contrary. This case seems to be an authority in point to establish what has been laid down, that in case of a deed-poll, (as this which is called a deed enrolled must be intended to be,) the lessor himself is estopped, though the lessee be at large; and this cannot be intended an indenture, because then the lessee would have been estopped likewise, if he had sealed it, which in this case it appears he did not, because it was unknown to him, and therefore was not estopped, whether it were by indenture or deed-poll.

Bro. tit. *Leases*, 36; 7 E. 4, 29.

These estoppels continue no longer on either part than during the lease, for as they began at first by the making of the lease, so by the determination of the lease they are at an end likewise; for then both parts of the indenture belong to the lessor.

Co. Lit. 47 b; 4 Co. 54 a; 8 Co. 44; Cro. Eliz. 36; Roll. Abr. 877.‖ The tenant is not at all events estopped to deny his landlord's title: the estoppel exists only during the continuance of his occupation; and if he be ousted by a title paramount, he may plead it. *Per* Lord Kenyon, Hayne v. Malthy, 3 T. R. 441.‖

When an interest actually passes by the lease, there shall be no estoppel, though the interest purported to be granted, be really greater than the lessor at that time had power to grant; as, if A, lessee for the life of B, makes a lease for years by indenture, and after purchases the reversion in fee, and then B dieth; A shall avoid his own lease, though several of the years expressed in the lease are still to come; for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. So, if lessee for ten years makes a lease for twenty years, and afterwards purchaseth the reversion, yet it shall bind him for no more than ten years, for the same reason; because, when he made a lease for twenty years, this was certainly a good lease for ten years, and so far an interest passed, which he may confess, and avoid it for the residue, by saying that he had no more than for ten years in it himself; *sed quære* of this? for the reason seems not satisfactory.

Co. Lit. 47 b; Vent. 358; and vide Skin. 3; Carth. 247, 248; Salk. 275, pl. 1. {1 Johns. Ca. 90, 91; 2 Cain. Er. 302.}

In ejectment, plaintiff declared of a lease for five years, and upon not guilty pleaded, the jury found that the lessor of the plaintiff had only a term for three years in the lands leased, *et si*, &c. Hale held this verdict against the plaintiff; for the judgment should be, that the plaintiff *recuperet terminum suum prædictum*, which is five years; and here the lessor's interest does not continue so long, and perhaps the defendant may be the reversioner after the five years ended, and then by this means the plaintiff's lessor will recover the land for two years more than he hath right to do; and he said, that, for this reason, he had before caused another plaintiff to be nonsuit. Wild was of the same opinion, but Twisden inclined *cont. et adjornatur.*

Roe v. Williamson, 2 Lev. 140; 3 Keb. 490, S. C.; Freem. 400, S. C. ‖ See Doe v. Porter, 3 T. R. 13, where this case was overruled. The declaration in ejectment being a fiction, it can be no objection that the lessor of the plaintiff had not power to grant a term of equal duration with that alleged.‖

If a man takes a lease for years of the herbage of his own land by indenture, this is no conclusion to say that the lessor had nothing in the

lands at the time of the lease made, because it was not made of the lands themselves.

Co. Lit. 47 b; Roll. Abr. 871.

If baron and feme join in a lease for years by indenture, rendering rent, where the baron hath all the estate, and the wife nothing; in this case, after the death of the baron, the lessee, in an action of debt brought by the feme, shall not be concluded to say, that at the time of the lease made the feme had nothing in the lands; for this shall not inure by way of estoppel, because an interest actually passed, though not from the feme. But another reason given is, because the feme being covert was not estopped, and, by consequence, neither shall the lessee, because all estoppels ought to be mutual.

Roll. Abr. 877; Cro. Eliz. 701, Breerton v. Evans.

If tenant of the land and a stranger join in a lease for years by indenture, this is the lease only of the tenant, and the confirmation of the stranger; and yet the lease operates, as to the stranger, by way of conclusion, and so it does to the lessee with respect to the stranger, because he having nothing in the lands, the indenture could no otherwise take effect as to him.

Co. Lit. 45 a; Roll. Abr. 877; Cro. Eliz. 701.

If A seised of ten acres, and B of other ten acres, join in a lease for years by indenture, these are several leases, according to their several estates, and no estoppel is wrought by the indenture to either party, because each has an estate whereout such lease for years or interest may be derived; and the reason why estoppels at any time are allowed is, because otherwise, when the party hath nothing in the lands, the indenture must be absolutely void, which would be hard to say, when he hath, under hand and seal, done all in his power to make it good; and since it can be good no otherwise, it shall be good by estoppel, rather than be absolutely void. But, when an interest passes from each lessor, the indenture works upon such interest to carry that, and therefore leaves no room for its operating by way of estoppel. But since both equally joined in the lease, without distinguishing the several interests they had therein, the indenture works by way of confirmation, with respect to each from whom the whole interest did not pass; that is, as A's confirmation for B's part, and as B's confirmation for A's part; for since the lease of the whole was undistinguished, and by reason of the several interests that passed from each excludes any estoppel, therefore, rather than the indenture shall be void, with respect to the part of each other, it shall be construed a several confirmation by one of the other's part, and by the other of the other's part, which is the least operation the indenture can have with respect to each, from whom no interest passes, without being absolutely void.

Co. Lit. 45 a; Roll. Abr. 877.

So, if two tenants in common of lands join in a lease for years by indenture of their several lands; this shall be the lease of each for their respective parts, and the cross-confirmation of each for the part of the other, and no estoppel on either part; because an actual interest passes from each respectively, and that excludes the necessity of an estoppel, which is never admitted, if by any construction it can be avoided, as being one of those things which the law looks upon as odious, because it chokes and disguises the truth.

Roll. Abr. 877.

(O) Leases for Years by Estoppel, &c.

But, if two joint-tenants for life, or in fee, join in a lease, for years by indenture, reserving rent to the one of them only, this shall give him the rent exclusive of the other; and here the estoppel turns not then upon the interest passed by the lease, for that is several, according to their several rights, as in the other cases, which excludes any estoppel; but it turns upon the reservation of the rent, which being made in this manner, to one exclusive of the other, by indenture, works an estoppel against all the parties to say the contrary; and though the rent issues out of one part as well as the other, yet it not being part of the thing demised, but moving, as it were, rather by way of grant from the lessee after the lease made, the lessors are considered as accepting it in this manner by indenture, which concludes them as well as it doth the lessee. But, if the lease had been by parol, or deed-poll, reserving rent to the one joint-tenant only, this would not have excluded the other joint-tenant from an equal share therein, because this reservation coming, as it were, by way of grant from the lessee, and being only by parol, or deed-poll, could not estop or conclude the lessors, who, with respect to the rent, were as it were grantees, and only passive therein; and the rent shall follow the reversion in proportion to their several estates in that, as the cause for which the rent was reserved or granted in that manner, and so let in both to an equal participation thereof.

Co. Lit. 47 a; Roll. Abr. 878.

If two coparceners join in a lease for years, by indenture, of their several parts, this is said in one book to be but as one lease, because they have not several freeholds therein, but only one, as both making but one heir, and therefore shall join in an assize. But Moore is *cont.* where in ejectment the plaintiff declared of a lease by two coparceners *quod dimiserunt;* and exception being taken to it, the exception was allowed, because the lease was several as to each coparcener, for her respective moiety. And this seems the better law, because though they have but one freehold with regard to their ancestor, and therefore if they are disseised shall join in an assize, (*a*) yet as to their disposing power thereof they have several rights and interests, so that neither of them can lease or give away the whole.

Roll. Abr. 878; Moore, pl. 939, Milliner v. Robinson. (*a*) They cannot sever in avowry for rent. Page v. Stedman, Carth. 364, 365; 5 Mod. 141, S. C.; 12 Mod. 86, S. C.; 1 Lord Raym. 64, S. C.; 1 Salk. 390, S. C.; Comb. 347, S. C.; and see 2 Lutw. 1210.‖

If A mortgages lands to B upon condition to re-enter on payment of 10*l.* and after A before the day of payment is come, being in possession, makes a lease for years, by indenture to C, and then after performs the condition, this shall make the lease to C good against himself by estoppel; and it was farther adjudged, that even the feoffee of A should be bound by his lease, which took its effect only at first by estoppel; because he coming in under one who was estopped, should be himself estopped likewise, which was still a stronger case than the first. And this was adjudged in Ireland, and afterwards affirmed on a writ of error here, and seems a very reasonable judgment; for if a subsequent purchase shall make good a lease of lands by indenture, though the lessor had nothing in those lands at the time of the lease, and therefore his lease at first could only take effect by estoppel; much more in this case, where the lessor had a possibility of coming into the lands again, shall his performance of the condition after make good the intermediate lease. And so it should seem too if the condition were broken at the time of the lease, so as he had then nothing but an equity of redemp-

tion; yet if he should after be admitted to redeem in chancery, this would make good the intermediate lease which took effect at first only by estoppel.
Roll. Abr. 874, 876, Omelaughland v. Hood.

B tenant for the life of C and he in the remainder or reversion in fee join in a lease for years by indenture; this, during the life of C, is the lease of B, who then only had the present interest in the lands, and the confirmation of him in the remainder or reversion; but after the death of C then this becomes the lease of him in the reversion or remainder, and the confirmation of B, for the lessors having several estates in them in several degrees, the lease shall be construed to move out of each one's respective estate or interest as they become capable of supporting thereof; which is the most natural and useful construction of the lease, especially as there can be no estoppel in this case, by reason of the several interests which passed from each; and therefore during the life of the tenant for life, if the lessee being evicted, should declare of a lease by both, this would be against him, as was adjudged, because for that time it was only the lease of the tenant for life.
Co. Lit. 45 a · Dyer, 234; Moore, pl. 196; Poph. 57; Moore, pl. 939; 6 Co. 14, 15.

(P) Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and where an Entry before the Term begun is a Disseisin.

It has already appeared, that all leases for years at the common law, when they come *in esse*, are to be executed by the entry of the lessee. We shall therefore now consider what care the law has taken for the preservation and security of such leases as are limited to begin at a future time, and so cannot be executed by entry presently; what power the lessee hath over such an interest, and whether by any, and by what acts, either of the lessor, or strangers, the same may be barred and prevented from ever taking effect.

As to future interests, if one make a lease for years, to commence after the death of the tenant for life, or after the end of a lease for years then in being; and after the death of the tenant for life, or expiration of the term for years, a stranger enter by tort, yet may the lessee of the future interest grant over his term for years, before or without any entry made, and thereby transfer his power of entering and reducing it into possession to the grantee: for till entry of the lessee of such future interest, the lease is not executed, but remains in the same plight as it was upon the first making thereof, and then no intermediate acts, either of the lessor, or of strangers, can disturb or hurt it; because whoever comes to the possession, whether by right or wrong, takes it subject to such future charge, which the lessee may execute by his entry whenever he thinks fit, as by a title prior and paramount to all such intermediate violations of the possession. But, if the lessee of such future interest had once entered after the death of the tenant for life, or end of the lease for years, and had after been put out, then he could not grant over his term and interest to a stranger, because by his entry the lease was actually executed, and being after defeated by the entry of another, he had only a right of entry left in him; which right of entry the law will not suffer him to transfer to a stranger, any more than a right of action; and for the same reason, because in both cases it may encourage champerty and maintenance: but in the other case, where he hath not entered, he only transfers such interest as he himself had, which the tortious entry of the stranger had not disturbed or altered from what it was at the first making thereof.
Cro. Eliz. 15; 2 Co. 124; 3 Leon. 156, 158; 3 Mod. 198.

So, if one makes a lease for years, to begin two years hence; after the two years expired, before any entry, and whilst the lessor continues still in possession, the lessee may grant over his term and interest to another; because his *interesse termini* was not divested or turned to a right, but continued in him in the same manner as it was at first granted; and in the same manner he transfers it to another, who by his entry may reduce it into possession whenever he thinks fit.

Cro. Eliz. 127; Leon. 118, Wheeler v. Thoroughgood.

One made a lease for years to begin after the end or determination of a former lease for years then in being; the first lease determined; and the second lessee did not enter, he in reversion entered, and made a feoffment in fee, and levied a fine with proclamations, and five years passed without entry or claim of the second lessee; and if his term was barred, was the question? And it was adjudged, that by this fine and non-claim his term was barred; because after the first lease expired, the second lease was actually then come *in esse*, and reducible into possession by an entry presently; and then his not entering, which was his own fault and laches, could not stop the operation of the fine from running against him. But, if such fine had been levied during the continuance of the first lease, there, it was agreed, that the operation thereof should not begin to run on against the second lessee till the first lease were determined; because till then the second lease was only an *interesse termini*, which the second lessee could not reduce into possession by any entry till the first lease determined, and so was not obliged to take notice of the acts of strangers, or of the tertenant in possession. For if such future interest might be divested before it came *in esse*, the lessee or grantee thereof having never entered would have no means to revest it, and therefore till it comes *in esse*, the law takes care and secures it to the lessee or grantee in the same manner as it was at first granted: but, when the first lease is at an end, then the second lessee is to take care of it himself; and if he suffers five years to elapse after that time without entry or claim, this will bar such interest, because his right then commences in possession, and thenceforth the operation of the fine begins to run on against him. And where in Noy it is held, that if A leases to B for years, but yet A still continues in possession, and after levies a fine with proclamations, and five years pass, that this does not bar the term of B, but only carries the reversion of A, this case was denied by Twisden to be law; for till the entry of B the lessor hath no reversion; and therefore the fine can only operate on the possession.

5 Cro. 123; Cro. Ja. 60, Saffin's case; Leon. 99; 3 Mod. 198; Noy, 123, Archbold, v. Cook; Vent. 81; Sid. 459.

As the lessee must enter when his lease continues in possession, so if he enters before, this is a disseisin: therefore, where one brought debt for rent, and declared upon a lease, 29th Septemb. *habendum* from the feast of St. Mich. next ensuing for 21 years, rendering 10*l.* *per ann.* rent *virtute cujus* defendant 29th Septemb. entered, &c., on *nil debet* pleaded, and found for the plaintiff, it was moved in arrest of judgment, that here, by the plaintiff's own showing, there is no rent in arrear, for he says *virtute cujus* defendant 29th Septemb. entered, which is a day before the commencement of the term; and then such entry is a disseisin, because he hath then no right to enter. And this the court clearly agreed, and that no continuance of possession, though after the term actually begun, would purge

(Q) How Leases in Trust may be barred, &c.

the disseisin or alter the estate of the lessee: but yet they agreed that debt lay for the rent in respect of the privity of contract upon the lease made, but that the disseisin having gained a tortious fee, that should not give way to the term for years, though it were legal, being but a chattel.

Alexander v. Dyer, 2 Leon. 99; Cro. Eliz. 169, S. C.; Roll. Abr. 605; Dyer, 89, 96; 2 Roll. Abr. 420; Macdonel v. Weldon, 8 Mod. 54; 1 Str. 550, S. C.

So, where A made a lease to B 23 Septemb. *habendum* to him for 81 years from Mich. next ensuing, if C should so long live, and from and after the day of the death of C for 31 years more; the lessee entered the 23 Septemb., before the commencement of the term, and continued in possession for some years; then the lessor re-entered; and the lessee being out of possession after the death of C and during the continuance of 31 years, assigned over that term to the plaintiff's lessor, who being kept out of possession, brought ejectment, and recovered. 1. It was held that the term not being to begin till Mich., this was till then a future interest, and the lessee's entry before was a disseisin, and not a possession by virtue of the lease. 2. That whether this lease for 31 years were only a continuance of the first term, and that both together made but one term, as Bridgeman held, because the last day of the life of C shall be conjoined to the first day of the 31 years, and so no fraction be allowed, especially being for 81 years, which B cannot be supposed to outlive; or whether they were two distinct terms, as others held; yet either way it was not turned to a right by the entry of the lessor, because B was not possessed by virtue of the term, but by disseisin, and to purge that was the entry of the lessor; for if a stranger had entered after Mich., and disseised the lessor, this would not have turned the term to a right, because as to that the time for entry of the lessee was not come, nor was his entry in respect of that; no more will the entry of the lessor turn it to a right, and then it was well assignable to the plaintiff's lessor, especially if it should be taken as a future interest, as some held it should; for then the lessee was never in possession by virtue thereof, and, consequently, the lessor's entry could not turn it to a right.

Hennings v. Brabson, Lev. 45.; Keb. 155, S. C.; Stydson v. Glasse, 2 Brownl. 223.

But, where one declared of a lease 16 April, *habendum* from the *Annunciation* last past for ten years, *virtute cujus intravit, habuit tenementa prædict.* from the said *Annunciation;* this was held good, and that the lessee was no disseisor; for it shall be intended that he entered and occupied before by agreement, and a diversity was taken between this case, where the commencement of the lease is limited from a time past, and where it is limited to begin at a time to come; there, the entry of the lessee before that time is a disseisin.

Cro. Eliz. 905, Waller v. Campian.

(Q) How far, and by what Means, Leases for Years in Trust to attend an Inheritance may be barred or destroyed.

If lessee for years assigns over his lease in trust for himself, and after purchase the inheritance, and occupies the land, and then levies a fine with proclamations, and the lessee does not claim this lease within five years after this fine levied; this fine and non-claim will bar the interest of the lessee, though he who levied the fine had himself the possession by reason of the trust; for this trust passed included in a fine, and the trustee not making claim within the five years, his interest is barred thereby, and, consequently,

so is the interest therein of the *cestui que trust.* But *note;* It appears in other books, (*a*) where this resolution is cited, that the conusee was a purchaser of the estate, and then having no notice of the term, nor having made any agreement for it to have it assigned in trust for himself, if the fine had not barred it, and it might have been set up against his purchase, he would have been so far cheated. But it is said, it would have been otherwise, if by agreement this term had been to be assigned in trust for the conusee; and that upon very good reason: for he who hath the inheritance in trust, for whom a term or estate by extent is assigned, must be taken as tenant at will to his trustee, and then his possession is the possession of the trustee; the consequence of which is, that the fine levied by him who hath the inheritance will work only upon that, when it appears that it was so intended, and that the term should be kept on foot, and not barred; whereas in the case of Isham and Morris there does not appear to have been any such intention, nor does it appear that the conusee knew any thing of the term.

Cro. Car. 110, Isham v. Morris. (*a*) 2 Ventr. 329; 1 Sid. 459; 1 Lev. 272.

[So, a term of years, which is vested in trustees on any other particular trust, except that of protecting the inheritance, may be barred by a fine and non-claim. As, where A had a term of years vested in him for securing children's portions, and B being in possession levied a fine, and five years passed without any claim being made; it was resolved by the Court of King's Bench, that, admitting the term was in trust, it was barred by the fine.

Hanmer v. Eyton, Comb. 67. See also 1 Ch. Rep. 27, 33.]

A seised of lands, for continuance thereof in his name and blood, &c., makes a lease to B for five hundred years, in trust for himself during life, and after in trust for his brother, and so to others; and after, A being in possession according to the trust, covenants with D to stand seised of those lands, upon the same considerations as in the lease, to the use of himself for life, with remainders over, as in the lease, and upon the same trusts; and that the said lease, and all estates made or to be made by him should be to the same uses and trusts; and then A levies a fine, and five years pass, A still continuing in possession according to the trust, and after A's death the lessee enters; and if this lease was barred by the fine and non-claim for five years, was the question? No judgment appears to have been given: but Hale seemed to be of opinion that it was not, because here appeared no intent to bar it; for A was but tenant at will, and the fine did not displace the lease; as, if lessee for years levies a fine, and five years pass, the lessor is not barred, because *nihil operatur* by the fine, and *partes finis nihil habuerunt* may be pleaded to it: otherwise it would be, if such fine had been levied by the tenant for life: therefore, where lessee for years intends to levy a fine, it is usual for him first to make a feoffment, whereby he transfers the whole and present possession and fee to the feoffee, and then the fine operates upon the whole estate so united in the feoffee; but here *the lease for years was antecedent to the estate of the lessor* upon which the fine operates, and was subsisting in another person, viz., in the lessee, at the time of the fine levied. And he cited the Duchess of Richmond's case,(*a*) in C. B., which is said to be the same *in terminis*, and to be so adjudged, 1, Because the lessor was only a tenant at will, and there was a mutual confidence between them: 2. By reason of the privity that was between them. And he also cited one Heal's case, where A conveyed lands in fee

to B, with a covenant to make further assurance, then B let to A for forty years, and then, on request, A makes further assurances; the lease is barred without precedent agreement to the contrary, for that would have saved the lease, and then the further assurance would have been taken only to operate by way of corroboration and further confirmation of the lease. But the principal case in Hard. seems to be very darkly put in the book; for it does not appear to whom the fine was levied; and the notion of the term being antecedent to the fine, and therefore not barred for that reason, seems strange; for if it were subsequent, it could not most certainly be touched by the fine; and there in another book this case is cited as a case in point, that the term is barred by the fine; and this seems agreeable to some of the following resolutions.

Hard. 400, Focus v. Salisbury; 2 Ves. 481. (*a*) Corbet v. Stone, Sir Thomas Raym. 140; Lev. 271.

It was held *per curiam*, that a fine levied in pursuance of a trust cannot destroy any lease made by *cestui que trust*. But, though a fine levied by *cestui que trust* does not destroy or extinguish the trust, yet it is not safe to do it, for the danger of not being able to prove an agreement to the contrary.

Keb. 24, 25.

A, seised in fee, makes a lease to B for an hundred years, in trust to attend the inheritance, B enters, then A enters, and receives the profits, and after makes a lease for 54 years, and covenants to levy a fine *sur conusance de droit*, to confirm that lease, and a fine is afterwards levied accordingly, and five years passed without any claim made by B. And it was adjudged in C. B. and affirmed afterwards upon error in B. R. 1. That when A entered upon B he was but tenant at will to him, to which estate it is not always requisite that there be the express consent of both parties; but if there be any thing tantamount, it is sufficient: as here the trust implies, that the lessor shall take the profits, being *cestui que trust*, which includes at least an estate at will. 2. That when A made the lease for 54 years, though this would not be a disseisin, because the reversion was in the lessor himself, who made that lease, and yet by this the lease for 100 years was divested, displaced, and turned to a right. And, 3. that being so divested, this was barred by the fine and non-claim. And it was held that A only should have the term of 100 years, divested or not, and not B, who was but his trustee; and in this case A hath made his election by levying the fine to corroborate the term of 54 years, and there is no reason that A should have the land against his own fine: besides, if the term of 100 years should not be barred by the fine and non-claim, then B must have it, which was never intended; and it is but reasonable such term should be subject to be barred or extinguished by *cestui que trust* of that and the inheritance. And a general rule was taken in this case, that when the lessee at will, or he who enjoys the land by express or implied assent of his grantee or feoffee, makes a lease for years, or levies a fine, this shall be construed an ouster, disseisin, or bar, when such construction tends to the establishing of a lawful estate, as in the principal case; but when such construction tends to the destruction of an honest estate or interest, then such lease or fine shall be no ouster, disseisin, or bar; and therefore Keeling, Chief Justice, put these two cases: If one makes a lease for years, for security of money by way of mortgage, and as the course is, continues in possession, and takes the profits, and then levies a fine to J S, and pays the

interest duly, and the five years without notice or claim pass, this shall be no bar to the lease of the mortgage: so, if one purchase lands, and for the better security hath a long lease assigned to J S in trust to attend the inheritance, and then take the inheritance to himself by fine, and five years pass, and there are mortgages made in time after the first lease made, and before the fine levied; yet such fine does not destroy the first lease to J S, but the purchaser may use it to defend himself against the encumbrances; and he thought this difference would reconcile all the books.

Vent. 55, 80; Sid. 349, 458; Lev. 270; 2 Keb. 521, 597, 650, Freeman v. Barnes; 3 Mod. 197, S. C. cited. See acc. 2 Ves. 482.

One by will devises lands to trustees for 99 years, in trust for the payment of his debts and legacies, remainder to A his brother in tail; but, if A gave security to pay the said debts and legacies, or should pay the same within such a time, then the trustees should assign the term to him, &c. A entered after the death of his brother, with the assent of the trustees, and received the profits, and paid all the legacies, and also all the debts but 18*l.*, and afterwards A levies a fine to the use of himself for life, remainder to his wife for life, with divers remainders over, and dies, leaving his wife and one only daughter, his heir at law; the wife entered, and five years were past without any claim; and now the daughter, in the name of the trustees, brought an ejectment; and the questions were, 1. Whether this term for 99 years was bound by the fine and non-claim? 2. Whether it was divested and turned to a right at the time of the fine levied? for if it were not, then the fine would not operate upon it. No judgment appears to have been given in it; but upon the difference taken in Freeman and Barnes's case, it should seem not to be barred; for then it must turn to the prejudice of honest creditors, who were strangers and third persons; and A by his entry on the trustees could be only tenant at will, because his entry was with their consent, and no manner of intent appears in him to divest their estate or interest, and then his fine shall operate only on his own estate-tail, like a fine levied by a mortgagor, who is but tenant at will to the mortgagee, and whose acts being by permission of the mortgagee, shall not turn to his prejudice; though some said, the five years and non-claim passing in the lifetime of the wife, who was the survivor, made a great difference in the case; *ideo quære.*

Smith v. Pierce, 3 Mod. 195; Carth. 100, S. C.; 1 Show. 72, S. C.; Comb. 145, S. C.

If one takes an assignment of an estate extended upon a statute in the name of J S in trust to attend the inheritance which he hath in himself, and after he by lease and release, and fine levied in pursuance thereof, conveys that reversion and inheritance to another, and five years pass without any claim made by J S the trustee; yet this will not bar the estate or interest upon the extent, if it appears that the conusee of the fine was a purchaser of the whole estate, and so after his purchase J S to be trustee for him of the statute interest; for in such case the fine shall operate only upon the inheritance, and not to the barring of the statute interest, which is to attend and go along with the inheritance by way of trust for the purchaser. But, if the purchaser had no notice of such statute interest standing out, nor was by agreement to have the trust thereof upon his purchase, then, rather than he should be cheated thereby, the fine of *cestui que trust* should operate to the barring of his own trustee.

2 Vent. 329, Dighton v. Greenvil.

(R) When merged with the Freehold or Fee.

Upon evidence to a jury at the bar, on trial of an issue out of Chancery, it was agreed, that if one makes a lease for an hundred years in trust for himself and his wife, and afterwards they both join in levying a fine to a purchaser, for a valuable consideration, who had no notice of this lease in trust, though the fine does not convey the term itself to the conusee, the estate in law being in the trustee, yet this destroys the trust, so that the lease shall not hurt the purchaser.

3 Keb. 564.

These reasons and resolutions seem to make it manifest, that in the case of Focus and Salisbury, if the conusee of the fine were a purchaser for a valuable consideration without notice of the term, then the fine would so destroy the trust of that term, that it should not hurt him: but, if the fine were only in pursuance and corroboration of the former estates, then there would be no reason in the world that it should operate so as to destroy the term.

Hard. 400.

(R) Leases for Years, when merged by Union with the Freehold or Fee.

ANOTHER way, whereby a term for years may be defeated, is by way of merger, where there is an union of the freehold or fee and term for years in one person at the same time: in this case the greater estate merges and drowns the less; because they are inconsistent and incompatible. And yet there are several exceptions out of this rule, not only where such union is transitory, but even where it is permanent and continuing.

First, then, if a man makes a lease for years to A and afterwards makes a feoffment in fee to B with a letter of attorney to A to make livery, and he makes livery accordingly, yet this shall not drown or extinguish his term, because he did it only as servant to the lessor, and in his stead and right, and the feoffee after livery made is in by the lessor, and claims nothing from the lessee: neither shall his term pass, merged, or be confounded in the fee, which by the livery he gave to the feoffee, because he gave it only in right of the lessor, and not in his own right; though perhaps, to secure his term, and settle the reversion (which was all that was intended to pass) in the feoffee, it may be proper for him after such livery to make an entry for his term, because the livery gave the actual possession, though the agreement and intent of the parties will direct it so as to transfer only the reversion expectant upon that term after the lessee hath re-entered.

Co. Lit. 52 a; Moore, 11, 280, 605; Cro. Ja. 177; 2 Roll. Abr. 495.

If the lessor enfeoffs his lessee for years to several uses, the interest of the lessee is saved by 27 H. 8, c. 10, of uses which saves to all persons, and their heirs, which be or shall be seised to any use, all such former right, title, entry, interest, &c., as they might have had to their own proper use, in or to any manors, lands, &c., whereof they be or shall be seised to any use, as if that act had not been made; and therefore in such case his term being saved expressly by this act, he may enter and enjoy it, as if the feoffment to uses had been to any stranger.

7 Co. 48 a, 66 a; Moore, pl. 345, Cheney's case.

A leases to B for years, and after the lessor by indenture enrolled and fine conveys those very lands to the lessee and others and their heirs, to the use of them and their heirs, to the intent that a common recovery should be had and suffered against them, with voucher of the lessor, and that he should

(R) When merged with the Freehold or Fee.

vouch over the common vouchee, to the use of D and E and their heirs; all which was done accordingly; and the question was, if by all or any of these acts the term were extinct and gone? for the reversioners, who were in under the recovery, brought debt against B the lessee for rent. And on *nihil debet* pleaded, and all the said special matter found, it was adjudged, that the term still had continuance, and was not merged; for although it was merged and extinct by the union of estates till the recovery came, yet when that was suffered, the uses thereof were guided by the bargain and sale enrolled, and then it is all one as if it had been no conveyance or assurance to such uses *ab initio*, and is within the equity and intent of the saving of the 27 H. 8, c. 10, and is like a feoffment to uses, and the term and rent are revived; for the intent of the statute was not to hurt those who had estates, but to preserve them. And it was agreed *per totam cur.* that if a fine or feoffment had been made or levied to the lessee for years, that the term would not have been extinguished, but should be preserved by 27 H. 8, c. 10. The objection against all this was, that the bargain and sale and fine, were to his own use, otherwise he could not have been tenant to the *præcipe* for suffering the common recovery, and therefore, being to his own use, there was nothing to be saved within that statute. But it was answered and resolved, for the former reasons, that his own term was saved within the equity and intent of the statute.

Cro. Ja. 643; 2 Roll. Rep. 245, Ferrers and Curson v. Fermor; 2 Mod. 234, S. C., cited *arguendo;* Terry's case, Ventr. 280, cited. Croke's report of this case of Ferrers v. Fermor is the neatest and most perspicuous.

One seised of lands in fee makes a lease to B of 99 years to such uses as he should by his last will direct: afterwards he makes his will in writing, (having then no issue by his wife, but who however was *privement enseint*,) and thereby devises these lands to the heirs of his body on the body of his wife begotten, and for want of such issue, to B and his heirs, and dies; and about a month after a son was born, who by virtue of this devise enjoys the land, and after his full age suffers a common recovery, and then devises the lands to the plaintiff, and dies: the plaintiff brought this bill against B to have this lease of 99 years assigned to him. For the defendant it was objected, 1. That an estate in fee being by the will limited to B, who was also lessee for 99 years, the term was thereby drowned. 2. That this was in nature of a devise to an infant *in ventre sa mere*, which, as was objected, is not good, if there be none born at the time when the devise should take place. Notwithstanding these objections, it was decreed, that the defendant should assign the term to the plaintiff; for that such devise to an infant *in ventre sa mere* is good as an executory devise, and though the lands descend to the heir at law in the mean time, or go to the devisee in this case, yet it is subject to be defeated by the coming *in esse* of the infant, and the term for years in the mean time was only suspended, and, by consequence, must revive in the lessee when the accession of the inheritance, which occasioned that suspension, is defeated: and the term being created subject to the uses of the will, must follow the devise of the inheritance, as a trust to be disposed of as the *cestui que trust* shall direct.

2 Mod. 8, Nurse v. Yearworth; Finch's Rep. 155, S. C.

If one make a feoffment in fee to the use of himself for years, without limiting any other estate, the use shall not result to him in fee, because that would merge the term, against the express declaration and

manifest intent of the parties; and therefore, in such case, the reversion in fee must continue and settle in the feoffee.

Dy. 111 b, in margin *per* Popham and Aderson.

In ejectment the case was thus: Cook let to Fountain for 99 years, and two years after by lease and release Cook conveyed the inheritance to Fountain and another, to the use of Cook and the heirs of his body, with divers remainders over; and if by this conveyance the lease for 99 years was merged and destroyed in all, or in part, was the question? First, it was agreed, that if such conveyance to uses had been by fine or feoffment, it would not have been destroyed, but would have been preserved by the saving in 27 H. 8, c. 10. So likewise they agreed, that if there had been no lease for a year, but the release had been immediate to the lease for 99 years to such uses, in this case also the lease for 99 years had been preserved by force of that statute: but here being a lease for a year precedent, it was argued, that this was to the use of the lessee, and then, by acceptance thereof, he admitted the lessor's power to make such lease, and, by consequence, this was a surrender of the lease for 99 years, before the release to the other uses came to take place, and then the release after cannot revive it. And it was said, though this be all one conveyance, yet it differs from a feoffment; for it will not purge a disseisin, nor make a discontinuance; and if before the release the lessee grants a rent-charge, acknowledges a statute, confesses a judgment, or makes a lease for half a year, and then a release is made to him and his heirs to such uses; yet it was said, that he who hath the inheritance would have no remedy to avoid these charges, but in Chancery. On the other side, it was argued, that this was no merger of the 99 years' lease; or if it were, yet for no more than a moiety; for the reason of merger and extinguishment is not, as hath been argued, the party's admittance of the lessor's power to make a lease, but the merger is effected by the accession of the immediate reversion to the particular estate; and therefore a new lease by the lessor to his lessee is not a merger or surrender of the first term, if there be any interposing or intermediate term; and yet, in that case, the lessee admits the lessor's power to make the lease presently, as much as in the other: then, if the union and accession of the two estates be the cause of the merger, the *quantum* of the thing granted will be the measure of that merger, and, by consequence, the first lease here shall be extinguished but for a moiety of the lands. But 2dly, it was argued, that it was not extinguished for any part: for the term is saved within the letter, or at least within the equity of 27 H. 8, c. 10, for the intent of the saving therein was to preserve the balance between the *cestui que use* and his feoffees, according to the rule of equity by which they were governed before. Now suppose that Fountain had a lease for 99 years before this statute, and that Cook had desired him to accept a feoffment to his use, without doubt, the Chancery would not have compelled him to assign till the 99 years expired; and the same right seems now to be preserved by the saving, and the words are general, *all that shall be seised to any use*, not all that shall be seised by feoffment or fine; so that *the seisin to use* is the only thing the statute regarded, and *not by what sort of conveyance:* and lease and release are now a common conveyance; and the lease being expressly said to be to enable him to accept a release to other uses, shall not be construed to any other intent, or to be to his own use, otherwise than to enable him to accept such

release; and then if it should be admitted that the lease for 99 years was extinguished by the lease for a year, yet by the release it is revived; for being but one conveyance, it is within the equity of the statute. And Cro. Ja. 643, (*a*) is a stronger case, and yet resolved there, that though the bargain and sale had destroyed the term for a time, yet by the recovery it was revived, because then but one conveyance *ab initio:* so here. To all this it was replied, that the very reason of merger was the admittance of the lessor's power to demise, and then the whole is surrendered, because he admits the lessor to have power to demise the whole, though he had but a moiety, to himself; and that where there is an intermediate estate, no merger shall be, does not make against it, for the intermediate estate disproves his admittance that the lessor hath such power; but here is no such intermediate estate or impediment, and being joint-tenants *per my et per tout*, by the lease, the whole is merged by admittance of the lessor's power to demise the whole, though they agreed that a merger may be of one's part of an estate or term, and not of another's part. Hale cited a case, 6 Car. 1, Hele Sevam, where A. mortgaged lands to B for years, B redemises to A upon condition, if he does not pay such a sum, that he shall re-enter; and in the first conveyance were covenants for farther assurance by A. Then B desires him to levy a fine, which A. does accordingly; and there it was agreed, that the term redemised was extinguished: but, if it had been expressed to what intent the fine was, it was agreed there would have been no extinguishment of the term: and in this case, the lease is found to be *eâ intentione* to enable him to take a release. However, no judgment (*b*) appears to be given; but it seems reasonable that the lease for 99 years, in this case, should not be merged; or at least but for a moiety; and even in that case, equity would set up the moiety or the whole term again.

Cook v. Fountain; 1 Mod. 107, S. C.; 2 Lev. 126, S. C., by the name of How v Stile; Freem. 384, 392, S. C., by the same name; 3 Keb. 283, 309, 430, 452, S. C., by the same name; Wigston v. Garrett, Freem. 411. (*a*) Ferrers v. Fermor, *supra*. (*b*) || Freeman says, that he was told by Pemberton that it was afterwards adjudged that the term was not extinct. Freem. 392.

|| A deed purporting to be an assignment of an old term may, if that term has by any accident ceased, operate as the creation of a new one. As in the common case of the assignment of a term in which the freeholder in reversion joins in granting, bargaining, selling, and assigning the term; these words will resuscitate it, if it has become void.

Denn v. Kemeys, 9 East, 366.||

If tenant *pur auter vie* make a lease for years, and die, living *cestui que vie*, by this the lessee for years is become occupant, and then this accession of the freehold merges his estate for years, because they cannot consist together in one person: but if, in this case the lessee for years make a lease at will, and then the tenant *pur auter vie* die, (which was the principal case,) it was adjudged that the tenant at will was the occupant, and, by consequence, the lease for years, which was in another person, not drowned or merged, there being no union of the term for years, and the freehold in one person; and then the lessee for years may, by determination of his will, enter and enjoy his term, and the occupant cannot prevent or hinder him, because he claims in *quasi* by the first lessor, who had made such lease for years, to which the estate for life, during the life of the *cestui que vie*, was subject and liable.

2 Bulstr. 12, Chamberlain v. Ewer; Carter, 59, S. C. cited.

(R) When merged with the Freehold or Fee.

If tenant *pur auter vie* make a lease for years, to A, remainder to B for years, and A enter, and then the tenant *pur auter vie* die, here A the tenant for years, shall be occupant, by reason of the possession he had in him when the life fell; and yet his term for years is not drowned, by reason of the intermediate remainder to B for years; for this estate by occupancy is in the nature of a reversion expectant upon both the terms for years, as it was in the tenant *pur auter vie* himself after these leases made. And, in some cases, a term for years and a freehold may consist together in one person; as if lessee for 20 years makes a lease to his lessor for 5 years, this term for 5 years is not drowned in the freehold or fee of the lessor, by reason of the intermediate reversion for 15 years in the first lessee.

Bro. tit. *Surrender*, 52; 2 Bulstr. 12; Bro. tit. *Lease*, 63.

‖ A made a lease to B for 10 years, to begin presently, and afterwards A granted a second lease to C by deed of the same land for 10 years to commence at Michaelmas next. B the first lessee [before Michaelmas] purchases the fee, so that the term is drowned. C the second lessee may enter at Michaelmas, and enjoy the term, &c., by the opinion of the court of C. P. except Brown, J.

Dy. 112.

A seised of a manor, [and] having all the goods of felons *de se* within the same manor, makes a lease for years of parcel of the same manor to a man, and afterwards makes another lease of the same lands to commence after the determination, surrender, or forfeiture of the first lease. The first lessee was a *felo de se;* the lord lessor of the manor enters into the lands leased as forfeited, and the second lessee ousts him. And it seemed to Croke, that the entry was lawful enough. Harvey said, that the lessor to whom the frank-tenement belonged, entering into the land, the frank-tenement drowned the less estate, and the lease for years is extinct in the frank-tenement. And it was said, that therefore the first lease [was] extinguished. But, if before that the lord had aliened the manor, saving to him the liberty, and after had entered for the forfeiture, the second lessee could not enter; for it is not any determination of the first lease. Croke said, that if the lessor enfeoffed the first lessee of the manor, that is a determination of the first lease, and the second lessee may enter.

Northern's case, Hetl.‖

The case, in effect, was this; A seised in fee grants an *interesse termini* to B for 100 years, to begin at such a time, and before that time [grants the land in fee to C who] makes a lease for 21 years to D to begin in possession presently; then B, before the commencement of his term, grants it to D, who after grants a rent-charge, and the grantee of the rent-charge distrains C for it; and the only question was, whether the *interesse termini* were drowned in the inheritance, or if it had any existence in A so that he might thereout grant the rent? for then it would avoid [have preference over] the second lease for years, being before it, and, by consequence, be liable to the payment of the rent. It was resolved, that it was drowned in the inheritance; for, notwithstanding the second lease for years, the *interesse termini* is not so severed from the reversion but that by grant thereof to him who hath the inheritance, such future term or interest is drowned, and shall never rise again; and, by consequence, this rent shall not charge the possession of the termor, who had the estate before the rent granted, and comes paramount it; for though there was a severance of pos-

session by the second lease, yet the *interesse termini* being granted before that lease, and to continue for a longer time, that second lease was subject to be defeated by the *interesse termini* when it took effect; and therefore the *interesse termini* was *quasi* immediate to the freehold and inheritance, and therefore might drown in it.

Cro. Ja. 619, Salmon v. Swann. || Although the language in this report is applicable to merger, yet it must be read as referable only to extinguishment, or drowning, in that sense. Prest. on Merger, 124.||

|| Colbourne was sued in the spiritual court, for that, being executor to one Alice Leigh, he had not brought in a true inventory of all her goods, but had omitted and left out a lease of two houses; and this suit was at the instance of two daughters of the testatrix. Colbourne sued for a prohibition, and surmised and declared how this lease was extinct; and the matter was this. H. Leigh was seised of a house called the Marygold, and two other houses in London, and leased the said two houses to one Alice Cheap for twenty-one years, if she should live so long, and afterwards made a lease in reversion of the said two houses to the said Alice Leigh for twenty-one years, and afterwards he devised these two houses, and also the house called the Marygold, for her life to bring up his children, and died; after whose death the said Alice Leigh entered into the said house called the Marygold, and took the rents and profits of the said two houses for the space of seven years, *virtute testament. prædict.* upon which declaration the defendants demurred. And by Tanfield, J. Presently by the devise, the estate for life was in the devisee, and the term extinct by it; and that was sufficient for the plaintiff: and if there was any disagreement, the same was to be shown on the other side. But, if Alice had not notice of the devise, but died before notice, the same amounted to a disagreement. And as to the pleading of the agreement, he conceived it was well enough pleaded; for if the lease had not been, she might have entered, and then if such entry had been pleaded, it had been good enough; and then because she could not enter by reason of the said lease, she had taken the rents and profits, which is an actual agreement, and as strong as an entry. Also, we have showed, that she had entered into the house called the Marygold, of which the devisor died seised in possession, and that is a sufficient agreement for the whole; for it is an entire legacy as 18 E. 3, *Variance*, 63. If the reversion of three acres be granted, and the tenant for life attorn for one acre, it is a good attornment for the whole, for he cannot apportion his assent; and 2 E. 4, 13. If the executor deliver to the devisee goods to him devised to re-deliver them to him again at such a day, the same is a good assent and execution of the devise, and the words of the re-delivery are void. And by Gawdy, J. The devise did not vest the estate in the wife until agreement. When a man takes in a second degree, as in a remainder, the same vests presently before agreement; but where he taketh immediately, it is otherwise; and he held the agreement was well enough pleaded. And by Wray. Presently upon the death of the testator the freehold vested in the devisee, and if it was not an agreement, *ut supra*, by taking of the rents, yet the entry into the Marygold was a consent, and an execution of the whole legacy: and as to the rest he agreed with Gawdy. By Clench. The freehold vested presently in Alice Leigh before agreement. Also, the entry into the Marygold is an execution of the whole legacy to the devisee, for her entry shall be adjudged most beneficial for her, and that is for all the three houses.

Colbourne and Mixstone's case, 1 Leon. 129.||

(R) When merged with the Freehold or Fee.

My Lord Coke lays it down for a general rule, that one cannot have a term for years in his own right, and a freehold *in auter droit*, but that his own term shall drown in the freehold; and puts these cases. If a man, lessee for years, intermarries with the feme lessor, this shall merge and drown his own term for years; but if a feme lessee for years intermarries with the lessor, her term is not thereby drowned, because, says he, one may have a term for years *in auter droit*, and a freehold in his own right, as the husband in this case shall have.(*a*) So, if lessee for years make the lessor his executor, the term is not thereby drowned, because the lessor hath a term *in auter droit*. So also, if a master of an hospital, being a sole corporation, by the consent of his brethren, makes a lease for years of the possessions of the hospital, and afterwards the lessee for years is made master, the term is drowned *causa qua supra;* but, if it had been a corporation aggregate, the making of the lessee master had not extinguished the term, no more than if the lessee had been made one of the brethren: but, if a lessee for years of the glebe be made parson, the term is merged, by reason of the union of the term and freehold in him to his own right and use, though he has them in several capacities.

Co. Lit. 338 b; Plowd. 418, Bracebridge v. Cook. (*a*) || This position is not tenable; and the very example here given has been denied to be law in Lichden v. Winsmore, adjudged on a special verdict. 1 Ro. Abr. tit. *Extinguishment*, (A) pl. 10; 2 Rolle's Rep. 472. There it was holden, that if there be lessee for years, reversion for life to A, a married woman, and the lessee grant his estate to the husband, and then the wife die, the term is not extinct, because the husband has the estates in several rights; for the freehold was in the wife, and the husband was merely seised in her right.|| 3 T. R. 401; Freem. 289. See Attorney-General v. Sands, 3 Ch. Rep. 19; Plowd. 419, 420; 3 Leon. 111. Vide Prest. on Merger, 281, &c.

But this rule seems to admit of divers exceptions; for where the husband, possessed of a term for years, takes wife, and after the inheritance descends or comes to the wife, the term for years or the husband is not thereby drowned or merged, because the descent was an act of law, which the husband could not prevent, and therefore shall not turn to his prejudice; but he shall have the inheritance in right of his wife, and the term for years in his own right, as he had before, and therefore may give away or dispose of the term as he thinks fit, notwithstanding such descent of the inheritance to his wife. And this was the opinion of Fenner, Croke, and Fleming, Chief Justice, and so given in direction to a jury in a trial at bar; and upon a general verdict to that purpose, they gave judgment accordingly. And Croke seemed to make a question, if the husband, in this case, had issue by his wife after the inheritance descended to her, so as thereby he was entitled to be tenant by the curtesy, and to have a freehold in his own right, if this should merge the term till the wife's death; and yet he said this was a much stronger case. But Williams *totis viribus* against the judgment, and held the term clearly extinct; but, notwithstanding judgment was given *ut supra*. And in this case all the court agreed, that if the lease had been made upon trust, for the advancement of such a woman, and the lessee had after intermarried with that woman, and then the inheritance had descended to her, that this would not merge the term, but that he might clearly dispose thereof to the purpose intended; because he had it *in auter droit*, and to another use. So, in another book, it seems to be agreed, that if a man, being possessed of a term for years in right of his wife, purchases the inheritance, that by this the term for years, though in right of his wife, is merged and extinct, because the purchase was the express act of the

husband, and therefore amounts in law to a disposition of the term, by reason of the merger consequent thereupon; but a bare intermarriage of the feme termor with the reversioner will not work a merger of the term, because by the intermarriage the term is cast upon the husband by act of law, without any concurrence or immediate act done by him to obtain the same; and therefore, in such case, the law will preserve the term in the same plight as it gave it to the husband, till he by some express act destroys or gives it away.

Cro. Ja. 275; Bulstr. 118, Platt v. Sleap; Godb. 2.

But, where the husband himself is lessee for life, and intermarries with the lessor, this merges his own term, because he thereby draws to himself the immediate reversion, in nature of a purchase by his own voluntary act, and so undermines his own term; whereas in the other case, the term being in the feme till the intermarriage, is not thereby so drawn out of her, or annexed to the freehold, as to merge therein; because that attraction, which is only by act of law consequent upon the marriage, would, by merging the term, do wrong to a feme covert, and so take the term out of her, though the husband did no express act to that purpose, which the law will not allow. But in such case, if the feme should survive, and have dower of those lands, this seems a merger of her term for a third part at least, because now she hath the term and freehold both in her own right, and then the accession of the freehold must *pro tanto* merge and drown the term.

Co. Lit. 338 b; Plowd. 418 b.

So also, in case where the lessee for years makes the lessor executor, the term is not merged, because cast upon him without any act or concurrence of his, as a consequence of his being made executor; and therefore the act of law, which cast it upon him, shall preserve it in the same manner as if he had been a stranger, without any regard to the immediate freehold he had in his own right, which was only accidental.

Co. Lit. 338; Plowd. 418 b, 420 a; Freem. 289, S. P.

But, if a feme executrix takes husband, and the husband after purchases the reversion, and dies, yet the feme surviving shall not have the term to any other purpose but as assets to pay debts; for as to any right of her own therein, the term is extinct by such purchase of the husband, because that was his own express voluntary act, and therefore amounts to a disposition of the term by the merger wrought thereupon; (*a*) and so it was held by all the justices.

Moore, pl. 157. || So in Brace's case, Hetl. 120, if a feme sole executrix of a term marry him in the reversion and die, the term is not merged, but the administration of it shall be committed. Otherwise, perhaps, if she had purchased the reversion. (*a*) Hobart seems to have thought, that a purchase of the fee by the husband should not extinguish the term, Young v. Radford, Hob. 3; and such, it has been said, was the opinion of Lord Holt, 1 Salk. 326. But see *infra*.||

So, if one who hath a lease for years as executor purchase the inheritance, this merges the term, because the purchase was his own express act; nay, Baron Clerk held, that though the inheritance in such case had descended on the executor, that this likewise would merge the term; but how far it is law, may be a question. But as well in the case of the purchase, as of the descent, all agree that the term would not be extinct as to creditors, (*b*) much less in case where the lessor is only made executor of the lessee for years; though Plowden seems to insinuate, that even in

that case, the term is suspended during the life of the lessor; for he says, that after his death the term shall be revived.

Bro. tit. *Lease*, 63, tit. *Surrender*, 52; 3 Leon. 111, 112; Plowd. 419 b; 420 a; Freem. 289, S. P. (*b*) ‖And *qu.* whether Lord Holt, when he said, that the term shall not merge in this case, meant any more than that it shall not be extinct as to creditors. It is true, that Salkeld and Comyns state his *dictum* quite generally, (Cage v. Acton, 1 Salk. 326; Com. Rep. 69,) but the words of Lord Raymond in his report (1 Lord Raym. 520) seem to confine it to creditors. "Where a man has a term as executor, and purchases the inheritance, the term is not extinguished, Co. Lit. 264 b, 338 b. If that should be an extinguishment, it would be a wrong to creditors, and amount to a *devastavit*, which an act in law will not do. 8 Co. 136 a. And things shall be extinguished between the parties, which yet shall remain, and have existence as to strangers," &c. "At any rate," says Mr. Sugden, "it was an *obiter dictum*, and cannot affect a doctrine, apparently so well established, that in a case of this nature the term must merge in the inheritance, except as to creditors." Law of Vendors, 388.‖

Land was given to the husband and wife, and to the heirs of the husband; the husband makes a lease for years, and dies, the wife enters and intermarries with the lessee; and it was holden that his term was not extinct, because the entry of the wife put a total interruption to the interest of the lessee, and avoided the term entirely as to herself, because she was in of the freehold by survivorship paramount the lease; and then the lease cannot take place again, till after her death, against the heirs of the husband, and whether she will outlive the term or not is uncertain; so that during her life, the lessee had no interest, but only a bare possibility, which cannot be touched or hurt by the intermarriage, but continues just as it was before.

3 Leon. 157, 158; Bro. tit. *Lease*, 58.

[A lessee for 1000 years assigned the term to the lessor in trust for his wife and children, and the lessor accepted the trust, and declared the purposes of it. The Court of Chancery supported the trust, notwithstanding the merger of the term in the inheritance, and decreed the heir of the lessor to make a further assurance of the remainder of the term to a purchaser from the son of the lessee.

Sanders v. Bournford, Finch's Rep. 424.

A court of law cannot merge estates unless it finds them in the same person, and acquired, subject to some exceptions, in the same right. But courts of equity look into the beneficial interests and views of parties, and do not regard whether the estates are strictly in the same person, or in different persons. Hence it is a general rule (*a*) with these courts, that where the owner of an estate becomes entitled to a charge upon it (*b*) secured by a term of years, such term shall sink for the benefit of the heir. But exceptions to this rule are admitted in several instances; as, where the person entitled to the charge takes only an estate-tail (*c*) in the estate, and not the fee-simple. So, where by reason of a limitation (*d*) to trustees to preserve contingent remainders, the owner does not take the fee. So, where the owner of the fee (*e*) has manifested his intention, that the charge should still subsist. So, in favour of creditors (*g*) and of infants. The cases of infants turn upon a supposed intent; and the courts sink or preserve the term, as they find to be most beneficial for the interests of the infant.

Donisthrope v. Porter, Ambl. 600. (*a*) Ibid. Chester v. Willes, Ib. 246. (*b*) Though the owner were a lunatic, yet as between his mere, absolute real and personal representatives, the term shall merge, for as between these no equity can exist. Lord Compton v. Oxenden, 2 Ves. jun. 261. (*c*) Duke of Chandois v. Talbot; 2 P. Wms. 601. (*d*) Wyndham v. Earl of Egremont, Ambl. 753. (*e*) Powel v. Morgan, 2 Vern. 90; Thomas v. Kemish, 2 Vern. 354; 2 Freem. 207. (*g*) Ambl. 602; 2 Ves. jun. 264.

(S) Of Surrenders of Leases for Years.

Analogous to the case of merger at law, where the term and the fee come into the same hands, is the doctrine of courts of equity, that whenever a man is owner of the inheritance, and entitled to a trust term of the same estate, the term shall be attendant upon the inheritance.] {So if he is in equity the owner of the inheritance, and entitled to a legal term.}

Best v. Stamford, Pr. ch. 252; 1 Salk. 154; 2 Freem. 288. {2 P. Will. 236, Whitchurch v. Whitchurch; 2 Wils. 329, Goodright v. Sales; 1 Bro. C. C. 69, Scott v. Fenhoulet; 9 Ves. J. 509, Capel v. Girdler.}

Vide tit. "USES and TRUSTS," *infra* (H).

(S) Of Surrenders of Leases for Years: And herein,

1. *Of Surrenders in Fact or Express: And herein again,*

1. By what Words such Surrender may be made.

IT will not be here necessary to enter into a particular inquiry concerning the nature of a surrender, or of the several words whereby a surrender may be made, it being sufficient to say in general, that a surrender is a yielding up of an estate for life, or years, to him who hath the immediate estate in reversion or remainder, wherein the estate for life, or years, may drown by mutual agreement.

Co. Lit. 337 b; 2 Vent. 206; 3 Mod. 298; Perk. § 584.

So that any form of words, whereby such an intent and agreement of the parties may appear, will be sufficient to work a surrender; and the law will direct the operation and construction of the words accordingly, without the precise or formal mention of the word *surrender* in the conveyance. But then the party, who would have the benefit of such conveyance to work as a surrender, must plead it by the very words *sursum reddidit*, because these only can properly describe the operation of the conveyance as a surrender; and whoever would take advantage of a thing in pleading, must determine it to that particular species of operation whereof he would so have the advantage: therefore, if lessee for life or years say to the lessor, that his will is, that the lessor shall enter into his lands, and shall have the same, or is content that the lessor shall have again the land, and by virtue thereof the lessor enters into the land, this is a sufficient surrender: so, if the lessee say to him in the reversion or remainder, that he will occupy the lands no longer, or that I surrender to you such lands, &c., and he in the reversion or remainder thereupon enter into the land, these are sufficient and effectual surrenders at the common law: but, if such words had been spoken privately by the lessee, or by a stranger, and not by way of address to him in reversion or remainder, this could not amount to a surrender, because there could appear no mutual agreement of the parties for that purpose.

Perk. § 607, 608; Cro. Eliz. 156, 488; Leon. 179, 280: 2 Leon. 50; Roll. Abr. 497; 2 Vent. 206; 3 Mod. 301.

So, if lessee for years remise, release, discharge, and for ever quit-claim to his lessor all his right, title, and estate in or to such lands; this has been held to amount to a surrender, because a lease for years consisting only in contract, these words are sufficient to dissolve that contract, and let in the reversioner. But such words, in case of a lease for life, would not amount to a surrender, because that being an estate created by livery, must be defeated by act of equal notoriety, or express words of conveyance of the freehold, which the before-mentioned words are not, but rather applicable to a thing which lies only in grant. But of that *quære;*

for it hath been adjudged, that if tenant for life grant, surrender, and release to him in the reversion, that this was sufficient, and so would have been, though there had not been the word *surrender*, because the word *grant* would operate as a surrender after the conveyance executed; and that such surrender, though without notice or express agreement of the surrenderee, would be good till actual disagreement thereto.

Dyer, 251, pl. 91, 93; Cro. Eliz. 2; Cro. Ja. 169; Lev. 144; Keb. 807. [But a release of the lessee for life or years to the lessor does not amount to a surrender, for the words are repugnant; for the lessee is in possession, and the release supposes the lessor in possession. Jenk. 195, Ca. 2.] 3 Mod. 301; 2 Vent. 206; Show. Par. Ca. 150; 3 Lev. 284, Thompson v. Leach.

[So, where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the good-will already paid by such assignee," it was adjudged, that this agreement operated as a surrender of the whole term.

Smith v. Mapleback, 1 T. R. 441.]

But now by the statute of frauds and perjuries it is provided, that no leases, estates, or interests, either of freehold or terms for years, shall be surrendered, unless it be by deed, or note in writing, (*a*) signed by the party who make such surrender, or some other lawfully authorized thereunto, or by an act and operation of law: so that surrenders in law, or implied surrenders, remain as they did at common law, if the lease, which is to draw on such surrender, be in writing pursuant to that statute.

[(*a*) This note in writing, it hath been adjudged, need not be stamped; Farmer v. Rogers, 2 Wils. 26; Beck v. Phillips, 5 Burr. 2827. However, a stamp seems now to be rendered necessary by stat. 23 G. 3, c. 58.] {See 2 John. Rep. 430, Jackson v. Titus.} ‖ In the case of Roe v. Archbishop of York, 6 East. 101, it was contended, that a recital in the second lease of a surrender of the first, was a note in writing within the Statute of Frauds; but the court were clearly of opinion, that the fact of a previous surrender must be specially found, which fact the recital by no means imported; for the statement in the recital that the grant of a new lease was partly in consideration of the first indenture would be sufficiently accurate, if the acceptance of a second lease would by operation of law be a surrender of the first.‖

Since this statute, saith our author in another place, a lease for years cannot be surrendered by cancelling the indenture, without writing, because the intent of the statute was, to take away the manner they formerly had of transferring interests in lands by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment was a sign of passing the freehold before the statute, but is now taken away by the statute, so, he takes it, the cancelling of a lease was the sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party; and the words, viz. *by act and operation of law*, are to be construed a surrender in law by the taking of a new lease, which being in writing, is of equal notoriety with a surrender in writing.

Magennis v. McCullogh, Gilb. Eq. Rep. 236.] {6 East, 86, Roe v. Archbishop of York, *acc.*}

Although the statute directs that the deed or note in writing shall be signed by the surrenderor, yet where an agreement was entered into between the lessor and lessee, at the instance of the former, for the surrender of a lease, an assignment actually prepared, the key delivered up and accepted, and a long acquiescence on the part of the lessor, without any claim or de-

mand upon the lessee, it was decreed in equity that the lessee should be discharged of the rent from the time he had delivered up the key.
Natchbolt v. Porter, 2 Vern. 112.]

β A lease under seal of a house was held to be determined by the delivery of the key, the receipt of it by the lessor, and his putting another tenant in the house.
Randall v. Rich, 11 Mass. 494. See Mairs v. Sparks, 2 South. 516.*g*

2. Upon what Estate such Surrender may operate.

It appears by the definition before given of a surrender, that the same is a yielding up of an estate for life, or years, to him in the immediate reversion or remainder. But here a question may arise, what estate in the reversion or remainder will be susceptible of such surrender; for if the estate in reversion or remainder be but for years, it seems a great doubt in the books, whether a lease for years in possession may be surrendered, so as to merge and drown therein; and it is commonly said, that years cannot drown in years; therefore, where lessee for twenty years made a lease for ten years, and the lessee for ten years surrendered to his lessor, this has been held to be no surrender, so as to merge the ten years in possession, but only to transfer them by way of assignment or accession to the number of years then left in the lessor; for that years could not drown in years. But the contrary to this has been held with some clearness, and it seems to be now settled, that such surrender is good, and shall merge the first term; wherein it was agreed, 1. That if the term in reversion were greater than the term in possession, that the greater would merge the less, as ten years may be surrendered and merged in twelve or fourteen years. 2. It was held by Gawdy, Fenner, and Popham, that though the reversion were for a less number of years, yet the surrender would be good, and the first term drowned; as, if one were lessee for twenty years, and the reversion expectant thereupon were granted to one for a year, who granted it over to the lessee for twenty years, that this would work a surrender of the twenty years' term, as if he had taken a new lease for a year of his lessor; for the reversionary interest, coming to the possession drowns it, and the number of years is not material; for as he may surrender to him who hath the reversion in fee, so he may to him who hath the reversion for any less term: and therefore Popham held, that where lessee for twenty years makes a lease for ten years, and the lessee for ten years surrenders to his lessor, viz., the lessee for twenty years, that this is good, and the lessor shall have so many of the years as were then to come of his former term of twenty years, that is, as it seems, so many years as were to come of his reversion shall now be changed into possession: and he held further, that if such lessee for twenty years had made such lease for ten years, and then granted over the reversion for ten years only, viz., no longer than the lease for ten years was to continue, and such lessee for ten years had attorned, then the grantee of the reversion should have the rent and services, and the grantor the residue of the twenty years; and that the lessee for ten years might surrender to the grantee of the reversion for ten years, and he thereby would have in possession so many years, as were then to come of his reversion; and if he had a less term in the reversion than the lessee himself had in the possession, it should go to the benefit of the first termor for twenty years, who was his grantor; for the term in possession is quite gone and drowned in the reversion, to the benefit of those who have the

reversion thereupon, having regard to their estate in the reversion, and not otherwise: to all which Fenner agreed; and it appears by the case of Cook and Fountain, *supra*, to be taken for clear law, that a lease for ninety-nine years might be drowned by his acceptance of a lease from the reversioner even for one year.

Prest. on Merger, 197; Cro. Eliz. 173; Leon. 303; Owen, 97; Perry v. Allen, Leon. 323; Poph. 30; Co. Lit. 218 b; Cro. Eliz. 302; 2 Vent. 326.

But now, whether a lease for years in possession may be surrendered, so as to be merged in a lease in remainder, be the term in remainder greater or less than the term in possession, seems to be nowhere settled. Indeed my Lord Coke says, that if there be a lease to A for twenty years, remainder to B for ten years, and B release all his right to A, that here A hath an estate for thirty years, for one chattel cannot drown in another, and years cannot be consumed in years; but whether if A had granted and surrendered his estate and term to B, it would have been merged, does not appear. And Perkins holds, that if a lease for life be of lands, the remainder to a stranger for years, and the lessee for life surrender his estate to him in the remainder for years, it cannot take effect as a surrender, because an estate for life cannot drown in an estate for years; which reason seems to prove, that an estate for life cannot be surrendered to or merge in a reversion, if it be only for years: *ideo quære.*

Co. Lit. 173 b; Perk. § 589.

|| Although the surrender of a life-estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet it may have continuance to uphold a prior interest derived under it. Therefore, where J B C having a lease for three lives of manor where, by custom, the copyholds were demisable by copy, made a lease for years, by indenture of a copyhold tenement to defendant's father, and afterwards the estate of J B C was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff: held, that inasmuch as the lease to defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff could not avoid the same during the continuance of one of the three lives in the lease to J B C, notwithstanding the surrender of that estate.

Doe v. Pyke, 4 Maule & S. 146.

An agreement between landlord and tenant for the latter to give up possession and the former to take the stock, &c., at a valuation, and to make compensation for fallows, to pay all taxes, and permit the tenant to keep possession of part of the messuage and some of the outhouses to a certain day without paying rent or taxes, was held to operate as a surrender of the term, and not being on a deed stamp, was void.

Williams v. Sawyer, 3 Bro. & B. 70; and see 2 Moo. 656.

An acceptance of a surrender of a lease is not to be presumed from the rent having been paid by a third person, and not by the original tenant.

Copeland v. Watts, 1 Stark. 96.

A surrender of a lease cannot be made to sequestrators from the Court of Chancery; it must be to the lessor or party legally entitled under him.

Cornish v. Searell, 1 Mann. & Ry. 703.||

β A lessee who erects on the demised premises, a building, which he has a right to remove, renounces that right by surrendering his leasehold interest to the lessor, without reservation; and the right is not revived by his

subsequently taking another lease of the same premises, from the same lessor.

Shepard v. Spaulding, 4 Metc. 416.*g*

2. *Of Surrenders in Law, or implied Surrenders: And herein,*

1. With regard to Leases in Possession.

As to the surrender in law of leases in possession, this is wrought by acceptance of a new lease from the reversioner, either to begin presently, or at any distance of time, during the continuance of the first lease. And the reason such acceptance of a new lease amounts to a determination and surrender of the first is, because otherwise the lessee would not have the full advantage he hath contracted for by acceptance of the second lease, if the first should stand in the way, and consume any of those years comprised in the second lease; for which reason, and to enable the lessor to perfect and make good his second coutract, the lessee must be supposed to waive and relinquish all benefit of the first: therefore, if lessee for thirty years takes a new lease, though but for three years, and to begin ten years hence, yet this is presently a surrender and a determination of the whole first term of thirty years, because thereby he admits the lessor's power to make such lease, which, if the first should stand in the way, would be void, because the lessee had the lands already for a term of a much larger duration. And though such second lease be made to him *in futuro*, and at common law, though it were even by parol, yet it would be a present surrender of the first lease, because the admittance of the lessor's power to make such a lease, which is the cause of the surrender, is then at the time of the contract made for such second lease, and therefore the operation of it, to cause a surrender of the first, must be then presently too, or not at all. And it cannot be a surrender of the last twenty years, and remain good for the first ten years, because that would make a fraction and severance of the lease, which at first was entire, and passed by one entire contract, and therefore cannot either by any surrender in law, or even by any express surrender, be curtailed and divided; the consequence of which is, that such acceptance of a new lease being a present surrender of the first, the lessor may enter and take the profits for the whole thirty years, saving only the three years comprised in the second lease. Another reason perhaps of such surrender may be, because the lessor, having already made a lease for thirty years, cannot, during the continuance of that term, make any other lease to transfer the possession; but yet having the reversion expectant upon that term, he may transfer that for any less term, or to begin at any distance he thinks fit; and then if the second lease be by deed, it may as well be supposed to carry the reversion, the union whereof with the possession, though for never so short a time, will, as has already appeared, merge the possession. And though the second lease, which may be supposed to carry the reversionary interest, is not to commence till ten years hence, yet the first lessee has the interest and right thereof in him immediately, and then possession and reversion being inconsistent in one person at one and the same time, the one must merge and drown the other.

Bro. tit. *Leases*, 14; Dyer, 93, pl. 28; Perk. § 617; 3 Leon. 244; 5 Co. 11; Cro. Eliz. 521, 605; 2 Roll. Abr. 495. *β* The acceptance by a tenant of a new lease of the same premises, during the term of the first lease, is a virtual surrender of the first lease; but under certain circumstances, such presumption may be rebutted. Ransselaer's heirs v. Penniman, 6 Wend. 569.*g*

(S) Of Surrenders of Leases for Years.

A husband, seised of lands, made a lease for ninety years by indenture, and after enfeoffed certain persons, and took an estate to him and his wife in tail, and after the termor took a new lease by parol of the husband for eighteen years only, to begin presently; then the husband died, and his wife evicted the termor; and it was held she lawfully might, for the first lease was surrendered and drowned in law by the acceptance of the second, and then the wife's estate by survivorship, came in paramount the second lease; and though the second lease, which was the cause of the surrender of the first, was voidable by the wife after her husband's death, yet the surrender of the first, wrought by the acceptance thereof, was absolute and present.

Dyer, 140; 2 Roll. Abr. 495.

One let lands to A for life and twenty years over, and after let the same lands to B for forty years, to commence after the death of A and the end of the said twenty years; then B intermarries with A, and A dies, and B the husband hath the term for twenty years, yet his term of forty years is not surrendered by it, because that was not begun, but was a future *interesse termini*, to begin wholly after the first lease ended: so there was no union at all of the terms.

Bendl. pl. 59; And. 32.

If lessee for years makes a lease to his lessor for all but a day, this is clearly no surrender of his lease, because the day disjoins the union and prevents the merger, which would have followed if the lease had been for the whole term; for then the lessor would have had the whole estate entire in him, as he had before he made the lease, and, consequently, the lease would be merged and drowned in the reversion.

3 Bulstr. 203, 204; Roll. Rep. 387; 2 Roll. Abr. 497, 498; 2 Mod. 176.

Lessee for twenty-one years took a lease of the same lands for forty years, to begin immediately after the death of J S: it was held in this case, that this was not any present surrender of the first term, because J S might wholly outlive that term, and then there would be no union to work a surrender; and it being *in equilibrio* in the mean time, whether he will survive it or not, the first term shall not be hurt till that contingency happens, for if J S die within the first term, then what remains of it is surrendered and gone by the taking place of the second.

4 Leon. 30.

A man makes a lease for one hundred years, the lessee makes a lease for twenty years, rendering rent, with clause of re-entry, and after grants his reversion to the first lessor: he shall neither have the rent nor re-entry, because the reversion, to which it was annexed, is extinct and gone by way of surrender: otherwise it would be, if one make a lease for years, rendering rent, and after grant the reversion for life, or years, to which an attornment is had, and after such grantee surrender; yet the grantor shall have again the rent, because it was once a rent incident to the reversion, which by the surrender is restored whole again as it was before.

Moore, 94, 139; Lord Treasurer v. Barton, 3 T. R. 402; Webb v. Russell, S. C., cited by Lord Kenyon, and approved.

If one makes a lease for forty years, and the lessee takes a new lease for twenty years, upon condition, that if he does not do such an act, that the lease shall be void; and after he breaks the condition, whereby the lease is avoided, yet the surrender of the first continues, for that was absolute by

acceptance of the second, and the condition was only annexed to the second lease. So, if the lessor had granted the reversion to the lessee upon condition, and after the condition were broken, yet the surrender of the term would continue, because the condition was annexed only to the grant of the reversion, and moved from the lessor as his terms of the lessee's enjoyment of such grant; but the surrender, which is wrought by acceptance of such grant, and moves from the lessee himself was absolute. And the diversity is, when the lessor grants the reversion to the lessee upon condition, and when the lessee grants or surrenders his estate to the lessor upon condition; for a condition annexed to a surrender may revest the particular estate, because the surrender itself is conditional.

Plowd. 107; Co. Lit. 218 b.

So, if such second lease were by baron seised in right of his wife, and after the baron died, and the feme avoided the second lease, yet the surrender of the first, by acceptance thereof, is absolute.

Dyer, 140, pl. 43; 2 Roll. Abr. 495.

Lessee for life made a lease for years, rendering rent, and after surrenders to the lessor upon condition; then the lessee for years takes a new lease for years of the lessor, and after the lessee for life performs the condition, and evicts the lessee for years, who re-enters, and the lessee for life brings debt for the first rent reserved; and it was ruled, that it was not maintainable, for the lease out of which it was reserved is determined and gone. For though the surrender of the tenant for life, which made the lessee for years immediate tenant to the first lessor, and so enabled him to make such surrender, was conditional, yet the defeating of the estate for life, by performance of the condition, cannot defeat the estate of the lessee for years, which was absolute and well made, and then the rent reserved thereon is gone likewise.

Cro. Eliz. 264, Brewster v. Sir Thomas Parrot.

If one be lessee for life or years, and take a new lease of the same lands, though such second lease be void for any defect in the making or execution of it, as if it were for life, to begin at a future day, &c., yet it is a surrender of the first lease; for the acceptance of the indenture in the contracting and agreement to have a new lease, makes a surrender of the first lease before the livery is made; and therefore though that be void, yet it cannot set up the first lease again, which was before surrendered: and such contract for a new lease is a good evidence to a jury of a surrender.

Mellows v. May, Cro. Eliz. 873; Moore, 636, S. C., || but differently and more correctly reported as to this point; for there it is considered as a good surrender, because the second lease was good by virtue of the subsequent livery.|| Keb. 285.

But, if such second lease were void for want of power in the lessor to make it, then, notwithstanding such admittance of the lessee, the first lease would not be surrendered: therefore, where one made a lease for forty-one years by indenture 14 Nov. 1616, to A, to commence from the *Annunciation* which should be *anno* 1619, and after, the same year, by another indenture bearing date 3 Dec. made a lease to B for ninety-nine years, to commence from the *Annunciation* then last past, by virtue whereof B entered and was possessed, and then the lessor by another indenture 16 Nov. 1617, made another lease of the same lands to A, to commence from 17 Nov. 1619, for forty-one years, who accepted thereof, and after the commencement of his term A entered and was possessed, and made his will, and his executors let to the plaintiff, &c., and the only question was, if the acceptance of the second

lease by A had determined, discharged, or extinguished the first lease, so as to let in the intermediate lease to B? It was adjudged that it had not, because by the lease to B for ninety-nine years, and his entry, the lessor had but a reversion, and could not by his contract after with A give any interest to A; and the first lease to A was good as a future *interesse termini*, to take effect in possession when the time came, and thereby *pro tanto* to defeat the lease for ninety-nine years to B; and if it had not been for the lease to B, there had been no question but that the first lease to A had been by such acceptance of the second lease surrendered and gone; but that intermediate lease, being for so great a number of years, disables him, during that time, to contract for any less number of years, as the lease for forty-one years was.

Watt v. Maydewell, Hutt. 104; Lit. Rep. 268, S. C. [No surrender, express or implied, in order to, or in consideration of a new lease, will bind if the new lease is absolutely void; for the cause, ground, and condition of the surrender fails. *Per* Lord Mansfield, Zouch v. Parsons, 3 Burr. 1807; Lloyd v. Gregory, Sir W. Jones, 405, 406; Wilson v. Sewell, 4 Burr. 1980; Davison v. Stanley, Ibid. 2210. ‖ Roe v. Archbishop of York, 6 East, 86; 2 Smith, 166, S. C.; Lowther v. Troy, Ir. T. R. 198. The result of all the cases is, that where the second lease does not pass all the interest, which it was the intention of the parties should pass, the acceptance of it will not amount to a surrender in law of the first lease.‖

‖ Where a tenant for life with a power of leasing, referred to his power, and in execution of it granted a lease to a person having an existing valid lease, but the power was not duly executed; the new lease was not, as between the lessee and the remainder-man, construed to have inured out of the estate for life of the lessor; because, under that construction, the existing valid lease would be merged by a surrender in law, to the prejudice of the lessee.

Roe v. Archbishop of York, 6 East, 86; 2 Smith, 166.‖

If A lets to B for ten years, who lets to C for five years, C cannot surrender to A by reason of the intermediate interest of B, but in such case B may surrender to A, and afterwards C may surrender likewise, because then his lease for five years is become immediate to the reversion of A.

Perk. § 604.

β When two gave a lease for life to a third person, and he afterwards conveyed his interest to one of them, held, that this did not amount to a surrender of the lease.

Spear v. Fuller, 8 N. H. Rep. 174.

It seems that a lease for less than three years, whether written or not, may be surrendered or transferred by an oral expression of assent.

McKinney v. Reader, 7 Watts, 124.

The acceptance of a new lease by the lessee from the lessor, to commence before the expiration of the first, is a surrender of the first term.

Coleman v. Marburry, 3 Monroe, 221.

A demises to B, who underlets to C. In the middle of both terms it is agreed, between A and B, that B's tenancy shall cease; and between A and C, that C shall hold under A for a longer term. This inures as a surrender from B to A, and a new demise from A to C.

Rex v. Banbury, 3 Nev. & M. 292; 1 Adol. & Ell. 136.

A, the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to B, for the remainder of the term, the house and cottages being in possession of under-tenants, and the stable and yard in that

of A. The landlord accepted a sum of money as rent, up to the day of assignment, which was in the middle of the quarter. B took possession of the yard and stable only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. A paid no rent after the assignment, and the landlord received the rent from the under-tenants. Before the expiration of the term, the landlord advertised the whole of the premises to be let or sold. Held, that this was a surrender by operation of law of all the premises.

Reeve v. Bird, 1 C. M. & R. 31; 4 Tyrw. 612.*g*

2. With regard to Leases *in Futuro*.

Surrenders in law of leases *in futuro*, or future interests—and these can noways be surrendered; for an express surrender of such future lease or interest is not good, (except as after mentioned;) therefore, if one makes a lease for years to begin at Michaelmas next, this future interest cannot by any express surrender be merged, because there is no reversion wherein it may drown; for till the entry the lessee hath no possession, and, by consequence, there can be no reversion wherein that possession may drown. But yet if such lessee before Michaelmas take a new lease for years, either to begin presently, or at Michaelmas, this is a surrender in law of the first lease presently; because thereby he presently admits the lessor's power to make such lease, which, if the first lease should stand, he could not do; and since such lessee hath contracted for a new interest, inconsistent with the first, his acceptance of such new interest waives and dissolves the first, because the contract whereby it was made was entire, and therefore the whole first lease is surrendered presently.

Co. Lit. 338; 5 Co. 11; 10 Co. 53; Cro. Eliz. 522, 605; Poph. 9; 2 Roll. Abr. 496.

Lessee for years to begin presently cannot till entry or waiver of the possession by the lessor merge or drown the same by any express surrender, because till entry there is no reversion wherein the possession may drown: but, if the lessee had entered, and assigned his estate to another, such assignee before entry might have surrendered his estate to the lessor, because by the entry of the lessee the possession was severed and divided from the reversion, which possession, being by the assignment transferred to the assignee, may without any other entry be surrendered and drown in the reversion.

2 Roll. Abr. 494, 495.

3. With regard to the Thing itself so surrendered.

As to the nature of the thing surrendered, herein we must observe, that the acceptance of a new lease, which will work a surrender of the first, ought to be of something of the same nature and kind with the first; otherwise there can be no surrender of the first, because there is no inconsistency but that both may stand together. Therefore if lessee for years accepts a grant of a rent, common, estovers, herbage, or the like, for life or years, out of the same lands; or if such lessee for years accepts of a lease of the same lands at will only; all these amount to a surrender and determination of the first lease, because they admit the lessor's power to deal or contract for the lands, or a certain charge out of it, which, being inconsistent with the interest of the lessee under the first lease, dissolve and destroy it.

Mellows v. May, Cro. Eliz. 873; Moore, 636; Gybson v. Searl, Cro. Ja. 84, 177; 2 Roll. Abr. 496.

So, where lessee for sixty years of an advowson did, after the church became void, take a presentation to himself of the lessor, and was admitted, instituted, and inducted, this was adjudged to be a surrender of his lease; for by the acceptation of the parsonage he thereby gains a new interest for life in that which was the chief fruit of his lease, and, consequently, such interest being inconsistent with his interest under the first lease, amounts to a determination and surrender thereof.

Hutt. 105; Cro. Ja. 84.

But, if lessee for years of a park accepts a grant of the office of park-keeper of the same park for life or years, this is said to have been adjudged no surrender of the lease for years, because such office is collateral to the land, and not any ways issuing out of it; and yet Coke and Dodderidge thought, that whether he had the office of park-keeper first, or the lease for years of the park itself first, that the accession of the other to it would merge and drown the first, for the inconsistency that a man should be park-keeper to himself; *ideo quære.*

Cro. Ja. 177; 2 Roll. Abr. 496; Roll. Rep. 83; Godb. 419, 425; 2 Roll. Rep. 357, 361.

So, where one made a lease for 99 years of a manor, and after made the lessee bailiff of the same manor for 21 years, this was adjudged to be no surrender of his first lease: 1. Because the bailiff, as such, had no interest in the lands, but an authority only. 2. Because the bailiwick was no part of the thing demised, but of another nature; for the bailiff, as such, is a mere servant, and all he doth is for the benefit and in the name of his master. So, if such lessee of a manor were made surveyor or steward for life, this would not determine his lease; because in these capacities he is only a servant, and acts in the name of his master, and therefore no inconsistency therein with his having a lease of the manor.

Cro. Ja. 84, 177; Noy, 12; 2 Roll. Abr. 496.

But, where lessee for years of a house or castle accepted a grant of the custody thereof for life or years, this was adjudged a surrender thereof; because the custody is of the same thing which was leased, and a man cannot be keeper to himself.

Dyer, 200, pl. 62; Cro. Ja. 177; 2 Roll. Rep. 357.

If lessee for years of lands accepts a new lease by indenture of part of the same lands, this is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases for any more than that part only which is so doubly leased; and though a contract for years cannot be so divided or severed, as to be avoided for part of the years, and to subsist for the residue, either by act of the party, or act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and yet the lease for the residue stand good and untouched, because here the contract for the residue remains entire, whereas, in the other case, the contract for the whole would be divided, which the law will not allow.

2 Roll. Abr. 498, Fish v. Champion.

(T) Leases, when determined by cancelling the Deed.

As to leases for years, owing their existence to the deed or indenture whereby they are created, so that the cancelling or destruction thereof shall destroy and avoid the lease, a diversity seems to be taken in the books between such things as lie in livery, and may be executed by actual entry,

(T) Leases, when determined by cancelling the Deed.

and such things as lie only in grant, whereof no actual or manual occupation can be had; therefore, if one had made a lease for years, at common law, of lands or houses by deed or indenture, and tear, rase, or cancel it, yet this would not destroy the continuance of the lease itself, because such lease of lands or houses lying in manurance and actual occupation might at first have been made by parol only, without any deed or indenture: and therefore such deed or indenture being not of the essence of the lease, the destruction or cancelling thereof shall not defeat or destroy the lease or interest of the lessee, because his actual entry into the land, and continuance of the visible possession and occupation thereof, gives sufficient sanction and notoriety to the contract, as to the interest of the lessee in the lands and houses themselves, though thereby the deed itself, and all covenants, which had their existence only by the deed, are defeated and avoided. But, if the king made a lease of such lands or houses by letters patent, which are matter of record, if the letters patent and enrolment are destroyed or cancelled, the lease itself falls to the ground, because these letters patent and enrolment, which were of the essence of the creation and continuance of the lease, are destroyed and lost. So, if a common person had made a lease for years, or a grant for years, of tithe, common, advowsons, or other things which lay merely in grant; in such cases the cancelling or destruction of the deed, whereby they were created and subsisted, must necessarily destroy the interest of the grantee likewise, because such deed was of the very essence of the deed or grant, without which it could not have been made at first, nor can subsist afterwards, such deed being the only evidence of the contract, which could not be executed by any actual possession or manual occupation. But now, since the statute of frauds and perjuries, which makes all leases for above three years to have only the force and effect of leases at will, unless they be in writing, and signed by the party, &c., the deed or writing whereby such lease is made seems to be of the same essence as the lease itself; and therefore the cancelling or destruction of that seems to destroy and avoid the lease itself, because it destroys all evidence allowed by law for the support (*a*) thereof; though in such case, chancery frequently sets up the lease again, or decrees the party to execute a new one for the residue of the term, which is not against the prohibition of the act, because there was once a good and effectual lease made pursuant to the statute.

Bro. tit. *Lease*, 6, 16; Cro. Car. 399; Jon. 355; Moore, 35, pl. 116. *β* The owner of land leased a marble quarry thereon for ten years, and afterwards conveyed the land "reserving the use of the quarry till the expiration of the lease;" the lease was cancelled within the ten years with consent of the parties. Held, that the reservation was not thereby extinguished, but that the right would continue till the end of the ten years. Farmer v. Platt, 8 Pick. 339.*g* (*a*)‖In an opinion given by the author in the case of Magennis v. McCullogh, Gilb. Eq. Rep. 236, *et supra*, he lays it down expressly, that since the statute of frauds a lease for years cannot be surrendered by cancelling the indenture without writing; and this opinion, the fruit, most probably, of his maturer judgment, and certainly formed at a time when his mind was called particularly to the consideration of this point, has been lately received as sound law, and, consequently, overruling the doctrine in the text. Roe v. Archbishop of York, 6 East, 86; 2 Smith, 176. Though the case on which this opinion was given related to a lease of corporeal hereditaments, to a surrender of which, at the common law, the cancellation of the deed seems not to have been necessary; yet Lord Ellenborough considered the opinion as conclusive, even as to things which lie in grant. See also Bolton v. Bishop of Carlisle, 2 H. Bl. 259; Gilb. Evid. 107, *et supra*, vol. iii. 603.‖

And though this statute, in § 2, excepts leases not exceeding the term of three years, yet not absolutely even those; for it goes on: "not exceeding the term of three years from the making thereof, whereupon the

rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised. And in § 3, moreover, no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

29 C. 2, c. 3. A lease for three years to commence *in futuro* by parol, is void by this statute, 12 Mod. 610; 1 Ld. Raym. 736. But a lease by parol for less than three years to commence *in futuro*, is good. Riley v. Hicks, 1 Str. 651; Bull. N. P. 179, S. C. ‖The meaning of this statute is, that a parol agreement to this effect shall not operate as a term; but such a holding now operates as a tenancy from year to year; for what at the time of making the statute was considered as a tenancy at will, hath been since construed to inure as a tenancy from year to year, Clayton v. Blakey, 8 T. R. 3; so that though a parol agreement be void as to the duration of the lease, yet it will regulate the terms on which the tenancy subsists in other respects, as the rent, the time of year when the tenant is to quit, &c. Doe v. Bell, 5 T. R. 471; Roe v. Ward, 1 H. Bl. Rep. 97; Doe v. Weller, 7 T. R. 478. Taking it too that such an agreement creates a mere tenancy at will, yet, if that relation be not determined before the day of the demise laid in the ejectment, the lessor cannot recover; for a tenant at will is not a trespasser. Goodtitle v. Herbert, 4 T. R. 680.‖

[T 2. When forfeited.]

HERE it is to be observed, that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of the lease. For to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency.

A lessee may thus incur a forfeiture of his estate by act *in pais*, or by matter of record. By matter of record—where he sues out a writ, or resorts to a remedy, which claims or supposes a right to the freehold; or, where in an action by his lessor grounded on the lease, he resists the demand under the grant of a higher interest in the land; or, where he acknowledges the fee to be in a stranger: for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him. By act *in pais*—as, where he aliens the estate in fee. (*a*) But then the alienation must be by such mode of conveyance as displaces or divests the estate of the reversioner; (*b*) for if it have not that effect, the law will not adjudge it a forfeiture. It must be therefore by feoffment with livery; (*c*) for this only operates upon the possession, and effects a disseisin. It cannot be by a grant, or any conveyance in the nature of a grant, such as lease and release, bargain and sale; conveyances of this kind operating only on the grantor's interest, and passing only what he may lawfully depart with. And as it cannot be by grant, of course no forfeiture can by this way be incurred of an estate of those things which lie merely in grant.

Co. Lit. 251, 252; Hawk. Abr.; Co. Lit. 359; Dickey v. Spencer, 3 Leon. 169; Moore, 211; Goulds. 40, S. C.; Godb. 105 seems to be S. C.; Barkhouse's case, 4 Leon. 3; Dy. 209, pl. 21 in marg.; 2 Lev. 52. (*a*) Co. Lit. 251 b; 1 Burr. 92. (*b*) But, if tenant for years, the reversion or remainder being in the king, make a feoff-

ment in fee, this is a forfeiture; and yet no reversion or remainder is divested out of the king; and the reason is, in respect of the solemnity of the feoffment by livery, tending to the king's disherison. Co. Lit. 251 b. (*c*) But even in this case, the person entitled to take advantage of the forfeiture is not bound to do so, nor to enter till the expiration of the lease. 2 Sch. & Lefr. 99.

A lease by the tenant for a greater number of years than he has in the land occasions no forfeiture; because it is only a contract between him and his under-lessee, which does not operate upon the interest of the lessor to affect him with any prejudice.

Eastcourt v. Weeks, Salk. 187, by Treby, C. J. ‖So, where under a clause of re-entry in a lease for 99 years determinable on three lives in case the lessee, his executors, administrators, or assigns, should lease for more than seven years without license; the third life being in possession under his father's will, and being his executor, leased for fourteen years; Lord Chancellor held this lease to be no breach of the condition, because it is not for a certain time of duration, for life is uncertain; and the lease is not, nor could it be, for fourteen years absolutely in all events, but must determine with the life-interest in the lessor. Northcote v. Duke, 2 Eden, 319; Ambl. 511, S. C.‖

Forfeitures are also incurred by the breach of *express* or *conventionary* conditions; for the lessor having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal, nor repugnant to the grant itself, and upon the breach of those conditions may avoid the lease.

A condition for re-entry cannot be created but by express words, Machel and Dunton's case, 2 Leon. 33; neither can it be reserved to a stranger. Doe v. Lawrence, 4 Taunt. 23. β A demise to A B, his heirs and assigns, for such term of time as he pays rent, &c., he, on his part, covenanting for himself and his heirs, &c., to pay rent and perform the covenants, is a perpetual lease; on default, the lessor, but not the lessee, may elect to consider it forfeited. Folls v. Huntley, 7 Wend. 210.*g*

‖ Conditions of this sort are generally inserted with a view to secure the payment of the rent, to prevent the commission of waste, or to restrain the alienation of the estate without the license of the lessor.

Co. Lit. 214. But the assignor of a term, with a right of re-entry on breach of a condition, may enter for the condition broken, although he has no reversion. Doe v. Bateman, 2 B. & A. 168.‖ β A condition of re-entry in a lease is waived by a subsequent acceptance of the rent due. Coon v. Brickett, 2 N. H. Rep. 163.*g*

β A condition in a lease not to sell or dispose of any wood or timber off and from the demised premises, without permission in writing from the landlord, is a good and valid condition, and a breach of it works a forfeiture of the estate, although the tenant consents to reserve thirty acres as a wood lot, on a farm of one hundred and eighty acres.

Verplank v. Wright, 23 Wend. 506.

A lease contained a covenant "that in case the lessee should suffer or permit more than one family to every 100 acres, to reside on, use, and occupy any part of the premises, the lease should be void," &c.: it was held, that letting parts of the premises to persons for a year to cultivate for shares, made such persons tenants within the meaning of the covenant, and there being more than one such tenant to every 100 acres, the lease was thereby void.

Jackson, ex dem. Colden v. Brownell, 1 Johns. 287.

A proviso in an agreement of demise that the tenant should within a certain time erect a shop, and that if he did not do so, it should be lawful for the landlord or his agent to retake possession of the premises, and

the agreement should be null and void, was held to make it a lease voidable at the pleasure of the lessor only.

Doe d. Nash v. Birch, 1 Mees. & Wels. 402.*g*

A condition of re-entry, if the rent be behind for any given time after the day prescribed for payment, is not saved by the attendance of the lessee with the rent on the first day of payment; for if the lessor be not then there ready to receive it, the lessee must attend again on the last day.

Co. Lit. 29 a; Plowd. 70 a, b.

But to enable the lessor to take advantage of a condition of re-entry upon the non-payment of rent, several previous ceremonies are required, which are treated of under tit. *Condition* (O.), *supra*, and tit. *Rent* (I.) (K.), *infra*.

β See also McCormick v. Connell, 6 S. & R. 151; Story, Eq. Jur. § 1315; 6 Binn. 420; 4 Bing. R. 178; Jackson v. Harrison, 17 Johns. 66; 16 Johns. 222; Newman v. Rutter, 8 Watts, 51; 1 Saund. 287, n. 16; Bouv. L. D. *Re-entry*.*g*

A lease was made for fourscore years of a house, with a condition that the lessee, his executors and assigns, should repair, and if, upon lawful warning given by the lessor, his heirs and assigns, the house should not be repaired within six months, it should be lawful for the lessor, his heirs and assigns, to enter: the lessee underlet the house, and the lessor assigned the reversion; and the assignee gave the warning at the house to the under-lessee. It was adjudged that this notice to the under-lessee was not good, there being no privity between him and the assignee of the reversion. And a distinction was taken between rent and a condition for repairs; for this last is merely collateral to the land, and personal, and therefore warning is not of necessity to be given at the house, but notice of the want of repairs ought to be given to the person of the lessee, who has the grand interest.

Stweton v. Cushe, Yelv. 36; Owen, 114, S. C. by the name of Streetman v. Eversley; Moore, 680, S. C. by the name of Swelman v. Cuts; 1 Brownl. 135, S. C. by the name of Stretton v. Cush.

Conditions in restraint of alienation are legal and usual; (*a*) but it is not every alienation which falls within a *general* condition not to alienate. Alienations which are consequences of law, and do not take place directly by the act of the party, such as arise from (*b*) committing an act of bankruptcy, or (*c*) confessing a judgment, by which the term is taken in execution, provided there be no collusion, (*d*) are not considered as breaches of a general condition.

(*a*) But under an agreement for a lease, even if there be an express stipulation that it shall contain all *usual* covenants, the lessor is not entitled to have a covenant of this sort inserted. The right of the lessee to have the estate without any restraint, beyond what is imposed upon it by operation of law, is an incident to his estate, and cannot be taken away or abridged but by express and specific contract. There was for some time a contrariety of opinion upon this subject, as will appear from the cases here referred to; but the point seems to be now settled. Henderson v. Hay, 3 Br. Ch. Rep. 632; Morgan v. Slaughter, 1 Espin. N. P. 8; Folkingham v. Croft, 3 Anstr. 700; Jones v. Jones, 12 Ves. 186; Vere v. Loveden, 12 Ves. 179; Browne v. Rabem, 15 Ves. 528; Church v. Brown, 15 Ves. 258. Where there was a stipulation that the lease should contain the usual covenants in the neighbourhood of the land demised, and it appeared on the face of the agreement to be the intention of the parties to be guided by local usage, an inquiry was directed, whether a covenant not to assign was a usual and customary covenant in that neighbourhood. Boardman v. Moslyn, 6 Ves. 467. (*b*) Goring v. Warner, 7 Vin. Abr. 85, pl. 9; 2 Equ. Ca. Abr. 100, pl. 3; Philpot v. Hoare, 2 Atk. 220. Hence a general practice now obtains of inserting in leases a special proviso in case of such an event. Roe v. Galliers, 2 T. R. 133. (*c*) Doe v. Carter, 8 T. R. 57. (*d*) 8 T. R. 300.

But this exception from forfeiture in the case of bankruptcy is only in favour of general creditors, and not of particular assignees. And taking the benefit of an insolvent act is a breach of even such general covenant against alienation, because it is in the nature of a voluntary alienation.

Weatherall v. Geering, 12 Ves. 512; Ambl. 480, S. C.; Shee v. Hale, 13 Ves. 404.

It would seem that a devise of a term is a breach of a covenant not to assign; but the making of a will, (*a*) whereby the term vests in the executor, is not so.(*b*)

Knight v. Morz, Cr. Eliz. 60; Barry v. Taunton, Id. 330, 331; Poph. 106, S. C. (*a*) Poph. 106, cites Roper v. Roper as so adjudged. Vide 2 Eden, 377, the words of Lord Northington. (*b*) But see Fox v. Swann, Sty. 483, where it is said, that a devise of the term would not be a breach of the condition; and see also the dictum of the court in Crusoe v. Bugby, according to Wilson's report of that case, 3 Wils. 237, and what is said by Bayley, J., in Doe v. Bevan, 3 M. and S. 361. But see Parry v. Harbert, Dy. 45 b; 4 Leon. 5, S. C.; 1 Ro. Rep. 214, S. C. cited; Anon. 3 Leon. 67.

It has been determined, (*c*) that a covenant not to assign will not restrain an underletting. But a covenant (*d*) not to underlet will restrain an assignment, both according to the letter and spirit of it. And a covenant (*e*) not "to let or assign," comprehends an underlease.

(*c*) Crusoe v. Bugby, 237; 2 Bl. Rep. 766, S. C. (*d*) Greenaway v. Adams, 12 Ves. 395. (*e*) Roe v. Harrison, 2 T. R. 425; *β*Spear v. Fuller, 8 N. H. Rep. 174; The Trustees of D. C. v. Clough, 8 N. H. Rep. 22.*g*

Where there was a proviso for re-entry, in case the tenant should demise, lease, grant, or let the premises, or any part or parcel thereof, or convey, &c., to any person whomsoever, for all or any part of the term, without license; and the lessee, without license, agreed with a person to enter into partnership with him, and that he should have the use of parts of the premises exclusively to himself, and the rest jointly with the lessee, and accordingly let him into possession; it was holden that the lessor was entitled to re-enter.

Roe v. Sales, 1 M. & S. 297. *β*A breach in the condition of a deed, which is not a limitation, but gives a mere right of re-entry, does not avoid the estate. The estate is solely terminated by the re-entry of the lessor. Spear v. Fuller, 8 N. H. Rep. 174.*g*

Where the condition in restraint of alienation was confined to the lives of the lessor and lessee, an assignment by the lessee's executor was holden to be no breach of it, because it was extinguished by the death of one of them. But in a late case, wherein there was a proviso against alienation, except by will, and the lessee devised the term to his wife, and appointed her one of his executors, and she joined with the other executors in selling the term for the purpose of paying debts, the Court of Common Pleas seemed to consider the executors (though the point was not expressly decided) as not within the exceptions, so as to alien without license.

Dy. 65 b; Moore, 11, pl. 40; Lloyd v. Crispe, 5 Taunt. 249.

Executors and administrators are clearly restrained from alienating, without license by a covenant which expressly names them; but it seems unsettled whether they are so, (*g*) where the covenant is only by the lessee and his assigns.

Roe v. Harrison, 2 T. R. 425. But see Moore, 44. (*g*) See Doe v. Bevan, 3 M. & S. 353; Smallpiece v. Evans, 1 And. 124; Sir William Moore's case, Cr. Eliz. 26.

A proviso against alienation without license is determined by a general license to assign *quibuscunque*. And it will be also determined by a license to assign to a particular person.(*h*)

Dumpor's case, 4 Co. 119; Cr. El. 815, S. C. (*h*) Brummell v. Macpherson, 14 Ves.

173; Hussey v. Starre, 3 Keb. 604, acc. Lord Chancellor, in giving judgment in the case of Brummell v. Macpherson, cited and relied upon a case in Dyer, 152 a, referred to in the argument in Dumpor's case, in which there was a proviso that neither the lessee, nor his executors, nor assigns, should alien or grant over the term to any person or persons, without license of the lessor, but to the wife or one of the children of the lessor. The lessee died, and his executors granted the term to one of the lessee's sons according to the proviso. The question was, whether the son could grant it over without license. And it seemed to Brooke, Browne, and Dyer, that he could not; but by Stamforde and Catlin, he might, because the restraint in the clause was determined when the grant was made to the son. *Sed quære hoc*, adds the reporter. And see Thornhil v. Adams, Cr. Eliz. 757, and Anon. Dy. 6 b, 7 a, & b. Though it be the established doctrine both at law and in equity that a covenant not to assign without license being once dispensed with, the condition is gone; yet the principle is so extremely questionable, that the court will not extend it. Where, therefore, the license was to be in writing, it would not allow a mere act, not establishing whether the party meant a license general or particular, to be considered as a general license; it would not construe a permission to carry on one trade to be a general license for any trade. Macher v. The Foundling Hospital, 1 Ves. Beam. 188.

If a lease be made to three, upon condition that they or any of them shall not alien without license, a license to one will destroy the condition as to all; for if it were good as to the other two, it would be in effect apportioning it, which cannot be done by the act of the parties.

Leeds v. Compton, cited in 4 Co. 120 a; Godb. 98, and 4 Leon. 58, S. C. somewhat differently reported. So, where in Dy. 324, it was said, that if a man leases lands upon condition not to alienate, and after the lessee aliens part with the consent of the lessor, he cannot alien the residue without further license; Popham, C. J., denied it to be law, because the condition cannot be apportioned by the act of the party, but the license for part determines the whole. 4 Co. 120 a.

Where a lease was granted to B, with a proviso for re-entry on the breach of any of the covenants on the part of the lessee, one of which covenants was, that B, his executors, or administrators, (not mentioning *assigns*,(*a*) should not underlet without license; and B became a bankrupt, and his assignees assigned to C, who, after B had obtained his certificate, reassigned to him, and he thereupon underlet; it was holden, that B having been discharged at the time of his bankruptcy from all covenants in the lease by the statute of 49 G. 3, c. 121, § 19, the underletting by him, which was in the character of assignee, was no forfeiture of the lease.

Doe v. Smith, 1 Marsh. 359; 5 Taunt. 795, S. C. (*a*) Had this word been inserted, it would, it seems, have made no difference. Doe v. Bevan, 3 M. & S. 353.

Cases of forfeiture are not favoured in law; and where the forfeiture is once waived, the court will not assist. Acceptance of rent will be considered as a waiver, if it appear that at the time the lessor received the rent he had notice of the breach of the condition.

Pennant's case, 3 Co. 64; Cr. El. 553, 572, S. C. by the name of Harvey v. Oswald; Moore, 456, S. C.; 2 Anders. 90, S. C. cited in Doe v. Harrison, 2 T. R. 431; Goodright v. Davids, Cowp. 803.

If a lessee exercises a trade on the demised premises, by which he gives a right of re-entry to the lessor by the terms of the lease, the lessor does not by merely lying by, and witnessing the act for six years, waive the forfeiture; for to that purpose some positive act affirming the tenancy is necessary. But, if he saw the lessee expend money in improvements with a view to the premises being so occupied, it might be evidence to be left to a jury of his consent to such alteration of the premises.

Doe v. Allen, 3 Taunt. 78.

A lessor, who has a right of re-entry on a breach of covenant not to un

derlet, does not by waiving his entry on one underletting, waive his right to re-enter on a subsequent underletting; nor, under a covenant for repairs, does he by a waiver on one breach bar himself of his right of re-entry on a subsequent breach.

Doe v. Bliss, 4 Taunt. 735.

Where there was a right of entry upon breach of either of two distinct covenants, the one to repair generally, the other to repair within three months after request; the lessor, by requiring the repairs to be done within three months, was considered as having dispensed with his right of entry under the general covenant.

Hill v. Barclay, 18 Ves. 64.

But with respect to the waiving of forfeitures, we are to distinguish between those cases where, by the terms of the contract, the estate, upon the tenant's doing or failing to do what he has stipulated to do or abstain from, is only determinable, and those where it absolutely determines; where the lease is only voidable, and where it is merely void. In the first, only a right of avoiding the lease accrues to the lessor, which right he may waive, as he may any other that is merely personal. In the last, the contract is at an end; the lease is determined; the lessee has no interest upon which the will of the lessor can attach.

Co. Lit. 215 a; Doe v. Butcher, Dougl. 50; Goodright v. Humphrys, Ibid. 52 n.; Sexton v. Boyle, Vern. & Soriv. 414.

Where a lease was made for years, if the lessee, his executors, or administrators should so long inhabit and dwell in the farm demised, and actually occupy the lands, and not let or assign over; and he became a bankrupt, and the assignees entered and sold the premises; it was holden, that the lease was void without entry, because this was not the case of a forfeiture, but the actual occupation by the tenant was annexed as a condition to the lease. And it was said, that the determination of the lease by such a condition in cases of bankruptcy had been considered as a settled point in the case of Doe v. Carter.(*a*)

Doe v. Clarke, 8 East, 185; Doe v. Hawke, 2 East, 481. (*a*) 8 T. R. 57.

A court of equity will occasionally relieve against a forfeiture and right of re-entry.

In cases of a covenant and clause of re-entry for non-payment of rent, it relieves the tenant, on payment of the rent, with interest and all expenses; and it does so upon the erroneous notion, that by this means the party is put in just the same state as if the rent had been paid at the time stipulated. The same relief may now be had at law under the statute of 4 G. 2, c. 28, § 4.

Lord Eldon observes, that the jurisdiction exercised in this case of rent seems to rest, at the present day, more upon the legislative authority of the stat. 4 G. 2, than upon any fair and reasonable ground to be maintained in a court of equity. Hill v. Barclay 18 Ves. 56.

But in this case, if it appear that the lessor is proceeding not only for the rent, but for the breach of other covenants, against the breach of which equity will not relieve; though the court will not permit him to take out execution on a verdict for the non-payment of the rent, yet it will not restrain him from proceeding on the breaches of those other covenants. And an injunction has been refused on a verdict in ejectment upon the proof of the breach of one covenant, against which relief might have been had, it appearing that the lessor was prepared to prove, at the trial, other

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breaches against which relief could not have been had, but was stopped by the judge, who held it unnecessary to go into further evidence.

Wadman v. Calcraft, 10 Ves. 67; Pure v. Sturdy, Bull. N. P. 97; Lovat v. Lord Ranelagh, 3 Ves. & Beam. 24.

Where by a covenant upon the breach of which the right of re-entry arose, the lessee was to lay out a specific sum in repairs in a given time; Lord Erskine thought, that as the lessee offered afterwards to lay out that sum; as it did not appear that there had been any dealing by request and refusal between him and the lessor in the period during which, by the express covenant, the money ought to have been applied; and as the lessor could not be injured by the expenditure of that sum, with an increase after the time had expired, and all the costs, relief was in the discretion of the court.

Sanders v. Pope, 12 Ves. 280. See also Denis v. West, 12 Ves. 475. The injunction had been continued by an order of the master of the Rolls, which implied a declaration of his opinion that the case might admit relief.

But this decision was not well received in Westminster Hall, where it was considered as resting more upon *dicta* than authorities, and as certainly going farther than any authority warranted. And in a later case, where there was a like covenant to lay out a sum of money in repairs within a given time, the Court of Exchequer (dissent. Wood, B.) refused relief; and that, notwithstanding there had been no requisition made by the lessor for performance of the covenant, and he had suffered the lessee to continue in possession for three years after the breach of it, but without receiving rent from him in the mean time, or otherwise recognising the subsistence of the tenancy. The time within which the covenant was to be performed having been limited by the lease, was considered as equivalent to a specific requisition of performance by the lessor, and the neglect on the part of the lessee as tantamount to a refusal at law. The court grounded its refusal to relieve upon this, that it has no means in such a case of ascertaining, or making compensation to the covenantee.

Bracebridge v. Buckley, 2 Price, 200.

There have been several decisions in cases of this sort, the general result and effect of which would seem to be, that where the court will relieve, the omission must be the effect of inevitable accident; and the injury or inconvenience arising from it must be capable of compensation; but that where the transgression is wilful, or compensation impracticable, the court will not interfere.

Rolfe v. Harris, 2 Price, 206, n.; Eaton v. Lyon, 3 Ves. 692.

Proceeding on these principles, the court has refused to relieve on a breach of covenant to insure against fire. The omission to insure is stronger indeed against the tenant than the omission to repair; because, in the latter case, the landlord may by exercising due vigilance see to the observance of the covenant; but, in the former, where the lessee has undertaken to keep insured, the landlord must rely upon him for the fulfilment of his obligation.

Rolfe v. Harris, 2 Price, 206, n.; Reynolds v. Pitt, 19 Ves. 134; White v. Warner, 2 Mer. 459.

So, relief will not be given upon a breach of covenant not to assign without license. It cannot relieve against such a forfeiture, as is said in one case,(*a*) "because it is unknown what shall be the measure of the damages." "That is known in a sense,"(*b*) observed Lord Eldon, "as, if the remedy was sought in an action of covenant, the law supposes the damage in com-

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pensation: but the court means, that relieving against the forfeiture they are to have, not the casual opinion of a jury, but, as it is expressed in some cases, some certain rule to go by."

(*a*) Wafer v. Mocat, 9 Mod. 112. (*b*) Reynolds v. Pitt, 19 Ves. 142; Hill v. Barclay, 18 Ves. 63.

Where there was a written agreement for a lease, in which it was stipulated that there should be inserted in the lease a proviso for re-entry upon breach of any of the covenants; if the tenant has occupied under the agreement, and acted in such a manner as would have given a right of entry to the lessor if the lease had been actually made; the Court of Chancery will not enforce a specific performance of the agreement upon the application of the tenant, unless there has been a waiver of the forfeiture on the part of the lessor; nor, if it decrees a specific performance, will it allow the lessor to take advantage of the circumstance of the lease bearing date before it was made, without giving the tenant the benefit of the waiver of the forfeiture.

Gourlay v. Duke of Somerset, 1 Ves. & Beam. 68.

‖Where a lease contained two clauses of re-entry, the one in case the yearly rent of 300*l.* was in arrear thirty days after it became payable, and the other in case the yearly rent was in arrear, which was stated to be payable half-yearly, at *Lady-day* and *Michaelmas*, it was held that the landlord had a right to re-enter on non-payment of each half-year's rent, as the former clause contained the description of the amount to be annually paid, and the latter the times for payment.

Doe v. Golding, 6 Moo. 231.

Where the lessee covenanted to pay the rent, and not to assign without leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants thereinafter contained on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor that, upon the lessee paying the rent, and performing all and every of the covenants hereinbefore contained, on his part to be performed, he should quietly enjoy; held, that the lessor could not re-enter for breach of the covenant not to assign, for the proviso was restrained by the word hereinafter to subsequent covenants, and, though there were none, the court could not reject the word.

Doe v. Godwin, 4 Maule & S. 265.

A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee, in January, 1825, executed a lease, which purported to convey all his real and personal estate to trustees, for the benefit of his creditors. In April, 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt; it was held that the deed of January, 1825, was an act of bankruptcy and void, and that it did not operate as a valid assignment of the tenant's interest in the lease, and therefore that there was no forfeiture.

Doe v. Powell, 5 Barn. & C. 308.

Where a lease contained a proviso that if the rent was in arrear for twenty-one days the lessor might re-enter, though no legal or formal demand should be made, it was held, that the rent having been in arrear for twenty-one days, the lessor might maintain ejectment, without actual re-entry or demanding the rent.

Doe v. Masters, 2 Barn. & C. 490; 4 Dow. & Ry. 45; and see 6 M. & S. 121.

(U) Of the Renewal of Leases, by whom, &c.

Where a lease of coal-mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether if the tenant should cease working at any time within two years, after the working had ceased more than two years, the lessor received rent; it was held that a tenancy from year to year was not thereby created, as the lease was not absolutely void by the lessee's ceasing to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cessation to work, commencing two years before the day of the demise in the ejectment.

Doe v. Bancks, 4 Barn. & A. 401.

A proviso for re-entry, if the tenant make default in performance of any of the clauses by the space of thirty days after notice, applies only to non-performance of affirmative covenants, not of negative covenants.

Doe v. Marchetti, 1 Barn. & Adol. 715.‖

ℓ If a tenant at will commit waste, it is a determination of the will, and trespass *quære clausum fregit* may be maintained against him by the reversioner.

Daniels v. Pond, 21 Pick. 367.

In a lease the lessee covenanted that he would pay a certain rent and taxes, and would make no strip nor waste, nor lease nor underlet the premises without the consent of the lessor; and it provided that the lessor might re-enter and expel the lessee, if he failed in the payment of the rent and taxes, or if he committed waste. Held, that an assignment of the lease was not a forfeiture, and that it gave the lessor a mere claim for damages.

Spear v. Fuller, 8 N. H. Rep. 174.

A termor, after deserting the demised premises, delivered the possession of them, with the lease, to a party who claimed by title adverse to the landlord, with intent to assist him in setting up that title, and not that he should hold *bona fide* under the lease. Held, that the term was forfeited by betraying the possession.

Doe d. Ellerbrook v. Flynn, 1 C. M. & R. 137; 4 Tyrwh. 473.ℊ

(U) Of the Renewal of Leases, by whom, and for whose Benefit.

It has been a practice, particularly in leases from the crown, from the church, and from other corporations, to grant a further term to the old tenants in preference to strangers; and as the expectation of renewal is rarely disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term. This interest is generally, but improperly, called their *tenant-right of renewal;* for a mere preference thus voluntarily given, in any individual instance, can never grow up into a compulsory obligation. A right to renewal can be founded only on the custom of the country in which the land lies, or upon express contract. Indeed a very great judge has said, that an agreement by a man having an estate of inheritance to make leases with covenant for perpetual renewal, each lease to contain the same covenant for ever, is a species of contract not to be executed; a doctrine, however, which that learned judge never brought himself up to act upon, and which cannot possibly be admitted; for it has been so long held, that such a covenant ought to be carried into execution, that, whether the judgment was originally right or wrong, it is so covered and sanctioned

by decision, that it would be infinitely too dangerous now to interpose a new rule in such cases. But, though independently on contract or custom, and merely as between landlord and tenant, there be no obligation upon the former to renew with the latter; yet the almost invariable recurrency of the grant to the same objects, has begotten an idea of something like property, and men have been so far from treating this ulterior interest as precarious, that they have acted upon it, as if it were fixed and certain. Hence, leases of this sort are become a fund for settlements of every kind, for mortgages and other securities; and are subjected to the same limitations, and applied to the same provisions with the most permanent interests.

See the very learned and ingenious argument for the appellant in the case of Lee v. Vernon, 5 Br. P. C. 10; and see also Mr. Butler's note in his edition of Co. Lit. 293 b; 16 Ves. 84; 9 Ves. 330.

This tenant-right, as it is called, is recognised and protected by courts of equity in many instances. Hence, where a trustee, executor, or guardian, avails himself of his situation, and gets a renewal of a lease for his own benefit, the courts will direct it to be for the use of the *cestui que trusts*, or persons beneficially interested in the old lease. So, where a person who has only a partial interest as tenant for life, mortgagee, or mortgagor, from the circumstance of being in possession, takes the opportunity of renewing, such renewal shall be for the benefit of the person entitled to the reversion. And according to the broad principles of equity, it should seem, that wherever a grant of a reversionary term is obtained (*a*) to the prejudice of the old tenant, by undue means, whether by *suggestio falsi*, or *suppressio veri*, the party so obtaining it, though an entire stranger, shall not be permitted to hold it to his own use.

2 Atk. 597; 2 Br. Ch. Rep. 248. (*a*) Parker v. Booth, 9 Ves. 583.

A lease of the profits of a market was devised to a trustee, in trust for an infant: before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, in regard that it being only the profits of a market, there could be no distress, and it must rest solely on covenant, which the infant could not bind himself in; on which the trustee got a lease to himself. It was decreed by Lord Chancellor King, that the lease should be assigned to the infant; that the trustee should be indemnified from the covenants of the lease, and should account for the profits since the renewal. His lordship said, he must consider this as a trust for the infant; for if a trustee, on refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que trust:* that the trustee should rather have let it run out, than to have had the lease to himself: that it may seem hard, that the trustee is the only person of all mankind who may not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusing to renew to *cestui que trust.*

Keech v. Sandford, or Rumford Market case, 2 Eq. Ca. Abr. 741; Sel. Ca. in Chan. 61, S. C. See Millett v. Millett, 7 Br. P. C. 367; Griffin v. Griffin, 1 Sch. & Lefr. 352.

A lessee for years, subject to a trust, devised *residuum bonorum:* the estate, if all sold, would but pay the debts: the executor paid the debts, and renewed the lease for a further term, it being a church lease, and offered to account, if any profits should arise out of the old term. It was insisted, that by paying debts to the value, the property was altered, and vested in him in his own right. But the lord keeper decreed the executor to account fo

the new as well as the old lease; and asked, if the executor acquainted the church with his case, and declared that he would renew and take it for the time of the old term, to the benefit of the creditors and executorship, and the rest for himself? By the French law, his lordship said, no churchman can make a lease to any but the old tenant, unless it first be refused by the old tenant.

Anon. 2 Ch. Ca. 207.

An executor in trust for an infant of a lease for 99 years, determinable on lives, renewed the estate for lives absolutely. It was holden that the renewed lease, though for lives only, should follow the nature of the original lease, and go to the personal representatives of the infant.

Whittier v. Whittier, 3 P. Wms. 99.

‖ If a person jointly interested in a lease with an infant get a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but, if it do not prove beneficial, he must take it upon himself.

Ex parte Grace, 1 Bos. & Pull. 376; Killick v. Flexney, 4 Br. Ch. Rep. 161.

So, if two partners hold under a lease, and one of them obtain a renewal, both shall have the benefit of it.

Featherstonehaugh v. Fenwick, 17 Ves. 298;‖ ß Phyfe v. Wardell, 5 Paige, 265.ℊ

If a bishop make a lease for 21 years, and the lessee create a trust thereupon, and the bishop die, and his successor for a fine renew the lease; though he were not compellable to do so, and though there be no trust of the second lease, yet equity will subject it to the former trust.

Per Serjeant Powis, in Canc. 6 Mod. 57, Anon.

A mortgaged a college lease to B for 4000*l.*, and secured the money likewise by statute to B; A died, and made C executor. The executor renewed in his own name several times, until the original mortgage lease expired by efflux of time. It was decreed that B paying the several fines, gratuities, and charges which C had expended on account of the renewal, should hold the premises until the debt were satisfied.

Luckin v. Rushworth, Finch's Rep. 392; 2 Ch. Rep. 113, S. C.

{If a woman grant an annuity for life, charging it on tithes leased to he for years, and covenant to pay the annuity and that the tithes shall continue subject to the payment of it during the life of the grantee, (which is in effect a covenant for farther assurance,) the grantee acquires an interest in the lease for his life; not a lease which is, as it at present exists, to last so long, but capable of being extended by renewals, and the charge attaching on each renewed lease; the grantor being bound to keep it up for his benefit, and if she marry and die, and her husband, who administers, again renews the lease with his own money, the annuity continues a charge on it. The husband taking by marital right is not esteemed a purchaser for valuable consideration, but stands precisely in the place of the wife. His obligation to renew is not the same, as, after the dissolution of the marriage, he is not bound by her personal covenants: but when the lease is renewed, the equity attaches on it; for it is considered as the same lease.

7 Ves. J. 174, Moody v. Matthews.}

One of three lessees under a dean and chapter surrenders, and gets a renewal to himself. *Per* Lord Keeper North, It is a trust for all.

Palmer v. Young, 1 Vern. 277.

John Coombe, possessed of several leasehold houses holden of the crown,

and having a daughter, Joanna, married to Samuel Clarke, devised unto such child or children, as his said daughter had, or should have, by Samuel Clarke, two of his leasehold houses, and directed, that the rents and profits should be applied for bringing them up, and educating them, and for placing them out, and setting them up, in such proportions as Samuel Clarke and his wife should think fit; and that they, and the survivor, should have power to divide the profits between their several children, when and in such parts as they should think fit. Part of the lease being expired, Samuel Clarke obtained an additional term from the crown for 25 years from the expiration of the term then in being. Samuel Clarke and Joanna his wife had two children, and on the marriage of Coombe Clarke, their son, to Martha Dethie, assigned one of the leasehold houses to trustees, for the remainder of the term then in being, and of the renewed term of 25 years, upon trust, to permit Combe Clarke to receive the rents and profits for life, and then to permit Martha to receive the rents and profits for her life, and after her death to apply the rents and profits for the son of the marriage for his education, and to convey the premises to him at 21. Coombe Clarke died, leaving Martha surviving, and several children, of whom Samuel Clarke was the eldest, who attained his age of 21, and survived his mother. Martha, after her husband's death, obtained an additional term of 28 years from the expiration of the existing lease, and afterwards made her will in 1748, and gave the residue of the estate in trust for her daughter Mary Clarke, an infant, and died in 1751. Upon her death, Samuel Clarke took possession of the house. He mortgaged it to the plaintiff in 1755, and died in 1756 intestate. Coombe Clarke, the next son, took out administration to his brother Samuel. Mary, the daughter, having married the defendant, Marriott, they got the tenant to attorn and pay the rent to them. On a bill by the plaintiff to have an assignment of the 28 years' term, and to be paid his mortgage money, or foreclose, Marriott and his wife set up title to the renewed term, as being obtained by Martha for her own benefit, and derived title to themselves under her will. The question therefore being, whether the additional term was to be considered as an interest acquired by Martha for her own benefit, or whether it should follow the uses of the settlement; Sir Thomas Sewell, master of the Rolls, was of opinion, that the additional term was to be considered as an engraftment upon the old term, on the principle which prevailed in the case of Rumford market and other cases; and followed the uses of the settlement and deed. Lord Camden, upon the appeal, was of the same opinion, and decreed accordingly.

Taster v. Marriott, Ambl. 688.

Richard Rawe seised of real estate, and possessed, among other things, of a lease of lands and houses in Suffolk originally granted by Cha. 2, in right of the duchy of Cornwall for 31 years, renewable from time to time, upon petition by the tenant in possession for a further number of years to fill up the term of 31 years, made his will 20th December, 1761, and reciting his being possessed of leasehold houses at Lambeth, and of several estates in land in Cornwall, for unexpired terms of years, gave and devised the said several leases to his wife for as many years of the term as she should live, and after her decease, (if the terms should be then in being,) he devised them to William Rawe for life, and after his decease, among such of the children of William Rawe as should be then living, and made his wife executrix and residuary legatee. The testator had renewed this lease just before his death, and the widow, during her life, renewed it several times,

stating herself widow and executrix of Richard Rawe, and continued in possession till her death in 1761, in which year she made her will, and disposed of these leases, as her own property. The question was, whether these renewed leases were the property of Richard Rawe, and should go according to the limitations of his will; or were the absolute property of the widow. Lord Bathurst thought, she renewed as executrix, subject to the trusts in the will of Richard, and that the plaintiffs had a right to the renewed leases, repaying to the widow's estate the sum she had paid for the fine, deducting the value of her chance in the renewed lease.

Rawe v. Chichester, Ambl. 715; 1 Br. Ch. Rep. 199, n., S. C.

William Williams devised leasehold estates, held of the crown to Sir William Barnaby, in trust to renew the same, then to his wife for life, remainder to his brother John Williams for life, remainder to Bennet Williams, son of John, and the heirs of his body, and made his wife executrix. Several years of the lease being to come, Lord Grosvenor petitioned for a lease of the reversion. Mrs. Williams discovering this, presented her petition as executrix, giving notice of it to the remainder-man, upon which she had a report from the surveyor-general, that she was in possession, and that the fine ought to be about 1200*l.* or 1400*l.* Lord Grosvenor got a warrant from the Treasury for a lease, but was to pay her a compensation for her right. John and Bennet Williams then presented petitions for renewal. Lord Grosvenor made several offers to Mrs. Williams, who communicated them to John Williams: but it appeared both Lord Grosvenor and Mrs. Williams conceived them to be for her own benefit. At length they settled the terms at 3000*l.* Mrs. Williams gave notice to John and Bennet of the probability of their agreeing, and advised them to take care of their own interests.—It was contended on the part of Mrs. Williams, that this 3000*l.* was absolutely her property; and that John and Bennet had no claim upon her for any part of it. But Lord Bathurst held, that in case she had renewed, it would have been a renewal as executrix; that wherever a partial tenant renews, it is for the benefit of the whole; and therefore that the 3000*l.* given by Lord Grosvenor as a recompense for her not renewing, was subject to the trusts in the will.

Owen v. Williams, 1 Br. Ch. Rep. 199, n.; Ambl. 734, S. C.

John Pickering, the plaintiff's father, previous to his marriage with Ann, the plaintiff's mother, gave a bond to trustees in the penalty of 400*l.*, conditioned to be void if he should assign to them, or to other persons to be nominated by Ann, a leasehold estate for the term of 99 years, or such term as he should have therein, for three lives, of which Ann's should be one, to the use of himself for life, remainder to Ann for life, remainder to the issue of the marriage. Ann died under coverture, leaving the plaintiff and another child. The estate was conveyed to John, Ann, and another life. In 1776 John died, having made his will, and thereby given to Henry, his issue by a second marriage, all the rest and residue of his estate. It did not appear how many renewals of the estate had taken place, or for what lives, but that John's being the last original life, they were all exhausted in 1776.—For the executors of the husband, and Martha, the second wife, it was contended, that all the original lives falling in 1776, there was no obligation on the father, or his estate, to renew, and that the expense of renewal having been his, it should be for his benefit. On the contrary, it was argued for the plaintiff, that this bond was purely a contract for a marriage settlement, and that the usual mode of executing it would be to insert a

covenant to renew to the same uses, the object of the parties being to give as large an interest to the children as to the parents. For this was cited Lawrence v. Maggs, before Lord Northington, 26th November, 1759, that the usual form of the covenant being to keep the lease fully estated, the settlement must be so executed. In that case, the party had, while solvent, frequently renewed the lease, and conveyed it to the uses of the settlement; the creditors insisted that the lease was part of his assets, and the conveyances fraudulent. But the court thought, that having conveyed according to the settlement, it was not fraudulent, but the settlement must be carried into execution. By Lord Chancellor Thurlowe,—The question is, whether the father, having renewed, shall be considered as having so done for the benefit of the settlement, or for his own benefit? He did not, by the marriage settlement, or by any subsequent act, express any intent to do it for the benefit of the settlement, and by his will, he has given it, by sufficiently express words, to his son. If a man has estates of his own, and also pure trusts, and gives the residue by will, only his own estates will pass by the residuary clause; but, if he has an interest, as well as a trust, the clause will pass both. But this is the case of a tenant-right, as it is called, which, though an improper, is become a technical term. In the West many estates derive their value from renewals. The crown also has many estates of the same nature. It has long been held, that where a trustee or an executor renews such an estate, it shall be for the use of the *cestui que trust*. The rule has obtained with respect to a tenant for life, who has the opportunity of renewal from being in possession, that he shall not obtain the reversion for his own use. The court therefore obliged him to stand seised as a trustee to the uses of the settlement: that was determined in Rawe v. Chichester, before Lord Bathurst. This is that case; for though John was author of the settlement, it was intended that the lease should be fully estated, and that he and she should have life estates, and that, so fully estated, it should go to the children. The renewal, therefore, must be to that purpose. The son is entitled to the estate, paying the expense of the renewal.

Pickering v. Vowles, 1 Br. Ch. Rep. 197; 2 Eden, 453; Randall v. Russell, 3 Mer. 190; Hardman v. Johnson, Ibid. 347.

In 1661 a lease was granted by Cha. 2, under the seal of the Duchy of Lancaster, of the parks of Hanbury and Tutbury in the county of Stafford, to Edward Vernon for 31 years from Michaelmas in that year. In the following year another lease of these parks was granted by the king to Sir Thomas Morgan, to commence immediately after the expiration of the preceding lease. This lease becoming vested in Edward Vernon, he in 1678, obtained another reversionary term from the crown for 63 years from the expiration of the lease to Sir T. Morgan.

Lee v. Vernon, 7 B. R. P. C. 432.

In 1687 Edward Vernon died, leaving issue two daughters, both of whom died without issue and unmarried. After his death the last-mentioned lease became vested in the appellant's father, who was accordingly in possession thereof until the time of his death, which happened in Oct. 1748. He left a widow, and the appellant, his only son, then about five years old. The widow, as executrix of her husband, and legatee of his personal estate, entered upon the premises comprised in the lease, and held them until her death in 1763. By her will she gave the appellant, her son, all the rest and residue of her personal estate, to be delivered up to him at his age of

21 years, or marriage; and under that bequest, he enjoyed the leasehold premises. These premises lying contiguous to the lands and castle of Tutbury, held by the respondent by lease from the crown, under the duchy seal, he, in the year 1755, applied to Lord Edgecumbe, then Chancellor of the Duchy of Lancaster, and represented to him, that he (the respondent) was the heir male of the said Edward Vernon, and in possession of the family seat by inheritance from Henry Vernon, his great-grandfather, and that the said leasehold estates had been disposed of out of the family by the said Edward Vernon, or his representatives, and were very desirable to be enjoyed with the respondent's said seat; and therefore he requested of Lord Edgecumbe, as a matter of favour, that a reversionary lease of the said parks might be granted to him, to commence on the expiration of the lease then subsisting. With this request Lord Edgecumbe complied; and accordingly a lease of these premises was granted on 12th of May, 1755, to the respondent for nine years and a half, to commence in Michaelmas, 1776, when the term of 63 years, granted by the lease of 1678, would expire: and for this lease the respondent paid a fine of 200*l.* In the year 1765, the respondent presented a petition to Lord Strange, then Chancellor of the Duchy of Lancaster, praying a grant to him of the said parks and premises for such further term, as, together with the terms then subsisting, would make up 21 years. And in the years 1766 and 1768 two petitions were presented by the appellant to Lord Strange, praying, that a lease might be granted to him of the said parks for ten years and a half, to commence from the 5th of April, 1786, when the lease now in question would expire, or for such other term as to his lordship should seem meet. In pursuance of an order made by Lord Strange, the matter of these petitions, on the part both of the appellant and respondent, came on to be heard before his lordship, in the presence of counsel for the parties, on the 8th of April, 1768, when his lordship declared, that the tenant-right or lord's favour of renewal of the lease was in the appellant; and dismissed the respondent's petition, but suspended for the present all proceedings upon the matter of appellant's petition, so far as the same respected the new leases prayed.—In Hilary term, 1773, the appellant filed a bill against the respondent in the Exchequer, by which he prayed, that the respondent might be declared a trustee for him, as to the lease granted in 1755, and might be decreed to assign the same to the appellant for his own use and benefit; the appellant thereby offering to pay the respondent the fine of 200*l.* and all reasonable expenses incurred in obtaining that lease, together with interest for the same from the respective times of payment. And as a ground for such relief, the bill charged, that when the said lease was obtained, the appellant was an infant of seven years of age; that the respondent had presented the petition, upon which that lease was granted, without the privity of the appellant's mother, in whom the possession of the premises then was; that no mention was made in that petition, as usual in such cases, of any term or interest subsisting in another person, nor any notice given to the appellant's mother of the application for such lease, but, on the contrary, the whole transaction was industriously concealed from her; and that the petition for obtaining such lease had unduly stated, that the respondent would have been entitled to the premises, if Edward Vernon had not disposed thereof; but the appellant charged, that the respondent was not of kindred to Edward Vernon. To this bill the respondent filed a demurrer; on the argument of which two of the barons ere of opinion, that the demurrer should be allowed, and the other two

were against the allowance of it, thinking, that the appellant ought to have the satisfaction of an answer to the bill, especially to such part thereof as sought a discovery of facts. Upon this the respondent put in an answer, in which he admitted, that when the lease was granted to him, the appellant was an infant; and that he did not give notice to the appellant's mother, when he applied to Lord Edgecumbe for a grant of the lease; but he denied that he had industriously concealed the transaction from her, and insisted, that he was not in any respect bound to disclose it to her, or to inform Lord Edgecumbe that she had at that time any interest in the premises; for that he had been informed, and believed, that until Lord Strange became Chancellor of the Duchy, no certain rules had ever obtained with respect to granting leases of duchy lands; but that the Chancellor of the Duchy for the time being had always been used to grant leases of estates held thereof to such persons as he thought fit, without regard, and without giving notice to the lessees or tenants in possession thereof; and though the respondent believed, that previous to the grant of the said lease to him, and after his personal application to Lord Edgecumbe, and his compliance with the respondent's desire, a petition had been presented to Lord Edgecumbe, to the effect stated by the appellant, yet that such petition was prepared as a matter of course, and in compliance with the forms of the office, without the respondent's direction or privity, and to the best of his remembrance was not signed by him: and he declared by his answer, that he never did assert, either to Lord Edgecumbe, or any other person, that he should have been entitled to the said leasehold premises, had they not been disposed of by the said Edward Vernon, nor did he obtain the said lease on any such or the like suggestion, but merely as being heir male of the said Edward and Henry Vernon, and of the senior branch of the Vernon family, and in possession of the family seat and estates in the neighbourhood of the said leasehold premises, and as a matter of friendship from Lord Edgecumbe, and a favour from the crown to the respondent, whose relation, Edward Vernon, originally obtained the grant of the said parks from King Charles the Second in consideration of many acceptable services, and in particular of money, to a considerable amount, advanced to the king during his exile at Breda.—To this answer the appellant replied, and passed publication, but did not examine any witnesses.—Upon the hearing of the cause, Feb. 24th, 1775, the court was equally divided, the Lord Chief Baron Smythe, and Mr. Baron Eyre being of opinion, that the bill should be dismissed; Mr. Baron Perrot and Mr. Baron Burland being of opinion, that the respondent should be declared a trustee of the lease in question for the benefit of the appellant. In consequence of this equal division, the cause was to have been heard before the Chancellor and Barons of the Exchequer, but before it came on Mr. Baron Perrot died, and therefore it was recommended by the court to the parties, that the bill should be dismissed without further argument, in order that the appellant might appeal; and the bill was thereupon ordered to be dismissed, but without costs. Upon the appeal, the Lords affirmed the order of dismissal, but without prejudice to any application which the appellant had made, or might make, to the officers of the crown, as to the manner of their executing, in this case, the trust reposed in them by his majesty.

Where a lessor has *expressly* covenanted to renew, what shall be the extent of such covenant, whether it shall be satisfied by the lessor's once renewing, or whether it shall amount to an engagement for a perpetua.

renewal, is a question, the decision of which must depend upon the words in which the covenant may be expressed, and the particular circumstances of each case.

β A covenant to renew a lease, under the same covenants contained in the original lease, is satisfied by a renewal of the lease omitting the covenant to renew.

Carr v. Ellison, 20 Wend. 178. See Rutgers v. Hunter, 6 Johns. Ch. 215; 3 Ves. 295; 3 Ves. 690; 6 Ves. 232; 9 Ves. 325; 7 East, 237; 5 B. & P. 449.γ

In a demise of corn-mills for 21 years, there was a covenant on the part of the lessor, that "if the lessee, his executors, &c., should, before the expiration of the term, be minded to renew, then upon application, &c., the lessor, his heirs or assigns, should grant such further lease, as should by the lessee, his executors, &c., be desired, without any fine to be demanded therefore, *and under the same rents and covenants only* as in the then lease." The question was, whether there must be a covenant for renewal again in the second lease? The Court of Exchequer were of opinion, that under the words *the same rents and covenants*, the covenant for renewal ought to be inserted; and on appeal to the House of Lords, their decree was affirmed.

Bridges v. Hitchcock, 5 Br. P. C. 6.

Again, in a lease for three lives, the lessor covenanted, that he, his heirs, &c., should and would (in consideration of a certain sum to be paid to him, &c., at Crewe Hall, or at the place where the said Hall then stood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more leases, *under the same rents and covenants* which were expressed in the then lease, *and so to continue the renewing of such lease or leases* to the lessee or his assigns, paying as aforesaid to the lessor, his heirs or assigns, the sum before mentioned for every life so added or renewed *from time to time.* Lord Hardwicke held this to be a covenant for perpetual renewal, and decreed a new lease to be granted to the assignee of the original lessee with a covenant inserted in it to that effect.

Furnival v. Crewe, 3 Atk. 83. β See Carr v. Ellison, 20 Wend. 178, *supra.*γ

Again, in such a lease the lessor had covenanted, that if the lessee, his heirs, &c., should be minded, upon the falling in of any of the lives, to surrender the demise and take a new lease; and thereby add a new life to the then two in being in lieu of the life so dying, that he, the lessor, his heirs, &c., upon payment of so much for every life so to be added, in lieu of the life of every of them so dying, would grant a new lease for the lives of the two persons named in the former lease, and of such other person as the lessee, his heirs, &c. should nominate in lieu of the person named in the preceding lease, as the same should respectively die, under *the same rents and covenants. There had been successive renewals from the time of the first lease; and in every lease the like covenant for renewal had been inserted.* The Court of King's Bench held, that the lessors, *by their own acts*,(*a*) had construed this to be a covenant for perpetual renewal.

Cook v. Booth, Cowp. 819. {But it seems clearly settled by later decisions, that the acts of the parties in making such renewals cannot be used to explain the contract contained in the last lease. See 3 Ves. J. 298, 694; 6 Ves. J. 237; 9 Ves. J. 325; 5 Bos. & Pull. 451, 452; 7 East, 245.} (*a*) But the construing of legal instruments by the acts of the parties has been protested against, and with great reason, by later judges. See Baynham v. Guy's Hospital, 3 Ves. 298; Moore v. Foley, 6 Ves. 238; Iggulden v. May, 9 Ves. 335; 7 East, 237; 2 N. R. 449.

But, where the defendant made a lease of a house to the plaintiff's late husband, for seven years, at 35*l.* a year; and therein covenanted (*inter*

alia) that he, his executors, administrators, or assigns, should, before the end of twelve months before the expiration of the lease, if thereto required by the said lessee, execute to him a further lease of the premises *under the like covenants*, and at the same rent, as were therein contained, for such further sum as the said lessee should then desire; and the said lessee died before the expiration of the lease: and the plaintiff, being his executrix, gave notice within the time limited by the lease, that she would take a new lease for the further term of fifty years, and now brought her bill for a specific performance of the covenant and lease for fifty years pursuant thereto; and the defendant insisted, that the covenant was personal only, and he was not obliged, the lessee being dead, to make a new lease to his executrix; Lord Macclesfield was clearly of opinion, that the plaintiff was entitled to the benefit of the covenant, and decreed the defendant to make a new lease at the same rent, and under *the same covenants* as were contained in the old lease, *except the covenant for renewal, which was to be omitted;* but this lease was to be made for twenty-one years only; for though the covenant was general, that the lease was to be granted for such further term of years as the lessee should desire, yet that must have a reasonable construction.

Hyde v. Skynner, Hargr. Jur. Argum. 426; 2 P. Wms. 196, S. C., but not so fully reported. Lord Hardwicke, speaking of this case in 3 Atk. 88, says, that the decree looks something more like an award and a compromise, than a decree, and therefore can hardly be an authority in any case.

So, where in a lease for years determinable upon lives, the covenant was, that the lessor would, upon the death of any of the appointees, (by name,) add a new third life upon payment of 200*l.* within six months; or upon the death of two of them, (by name,) within six months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new lease or grant for any three new lives to be nominated and appointed by the lessee, his executors, &c., for the like term as was thereby demised, *at and under the like rent, covenants, and agreements therein contained;* Lord Camden was of opinion, that the lessors were not under any obligation to grant any farther lease than for three lives only, and that the lessee was not entitled to have any covenants inserted for a farther renewal; the words of the covenant not requiring the lessor to grant a new lease, but upon the death of some one of the persons named in that lease, and when they were all dead, no further renewal could be claimed.

Russell v. Darwin, 2 Br. Ch. Rep. 639, n.; {6 Ves. J. 232, Moore v. Foley.}

So, under a covenant in a lease for 21 years, that the lessor, his executors, &c., would, at the end and determination of the said term of 21 years, execute a new lease of the demised premises, for the further term of seven years, to commence from the end of the said term of 21 years thereby demised, *subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects, as were in and by the then granted indenture of lease mentioned and expressed*, in case the lessee, his executors, &c., should desire the same; the lessee, his executors, &c., first giving twelve months' notice in writing to the lessor, his heirs or assigns, of his or their desiring such farther term of years as aforesaid; Lord Thurlowe held the lessee entitled to a lease for seven years only, saying, that he had not an idea that the intention of the lessor was to renew the covenant of renewal, or that it could be so construed in a court of equity, and that he made the decree for the same reason which Lord Mansfield gave in the case

before him, (Cook v. Booth, *supra*,) viz. that the lessee himself had put that construction upon it.(*a*)

Triton v. Foote, 2 Br. Ch. Rep. 636. {The courts in England lean against construing a covenant to be for perpetual renewal, unless it is perfectly clear that that is the meaning of the covenant. It is settled that a covenant to grant *a new lease with all the same covenants*, &c., does not include the covenant to renew, but means only a second lease with the same covenants *relative to its enjoyment* that are contained in the first. See 3 Ves. J. 295, Baynham v. Guy's Hospital; Ibid. 690, Eaton v. Lion; 6 Ves. J. 232, Moore v. Foley; 9 Ves. J. 325, Iggulden v. May; 7 East, 237, S. C.; 5 Bos. & Pul. 449, S. C.} (*a*) *Qu.* this reason.

In a lease made by the defendants to the plaintiff's testator, of a house, for 21 years, there was a covenant, that the defendants at the end of the first seven years would upon the surrender of that lease make a new lease for the term of 21 years *at the same rent, and with the same covenants as were reserved and contained in the old lease.* The bill was for a specific performance of this covenant: and the question was, *if the covenant for renewal should be inserted in the new lease.* Master of the Rolls, Sir Joseph Jekyll, was of opinion it should not, there being no words to show that it was the intention of the parties the lease should be renewed *toties quoties;* for that in effect would be to give the plaintiff a fee: and therefore decreed the defendant to make a new lease, *but without the covenant for renewal.*

Davis v. Taylors' Company, 25th of March, 1726, Hargr. Jurid. Arguments, 427.

The dean and chapter of St. Paul, London, being seised in fee of Mountjoy-house in London, on the site of which are the buildings now called Doctors' Commons, made a lease of the house and premises in 1567 to Trinity-Hall in Cambridge, for *ninety-nine* years from the determination of a subsisting lease which had been granted to Sir Thomas Pope in 1555, and was then become vested in Trinity-Hall. The rent reserved was only 5*l.* 8*s.* a year. But the house and premises were in *great ruin* and decay; and the lessees were to be at great expense in *new building*, and were to keep and leave the premises in good repair. Though Trinity-Hall were the nominal lessees, yet the lease itself expressed, that the premises were to be occupied by the society of doctors and advocates in the civil and canon law, with the reserve of an apartment for the master of Trinity-Hall; so that Trinity-Hall were lessees under a sort of trust for the doctors, who had removed from Pater-noster-Row, their former residence, and apparently meant to make Mountjoy-house their *fixed place of residence* in future. In the lease thus made to Trinity-Hall in trust for the doctors, there was a covenant by the dean and chapter, if Trinity-Hall should at any time during the term of 99 years surrender the lease, to make a new one for the fine of 20*l.* *for the number of so many years, and with* ALL *and singular the same covenants and conditions contained in this lease*, as the case of Dr. Bettesworth and the other appellants states the covenant, or *for the number of so many years and with* ALL *the same covenants, articles, and conditions expressed and contained in the said lease*, as the covenant is given in the case of the dean and chapter of St. Paul, the respondents. This covenant was followed by a covenant from Trinity-Hall, that if the dean and chapter *at any time thereafter*, as well as during the term of 99 years, should have need of counsel or advice in any cause or question concerning the ecclesiastical laws of the realm, then the advocates or doctors, on reasonable request from time to time by the dean and chapter, would freely give their best advice and counsel to them in every such matter or question. Within three or four years afterwards the statute of the 13th of Eliz. restraining deans and chapters, amongst others

(U) Of the Renewal of Leases, by whom, &c.

having spiritual promotion, from leasing for more than 21 years or three lives, was passed; and though there was a proviso in this statute against extending it to any lease which should be afterwards made *by reason of any covenant prior to the act*, yet this was so, that the lease to be made should not contain *more years than the residue of the years of the lease made before the act and then continuing lease* should be at the time of the lease, which should be made afterwards. By the act of the 14th of Eliz. the restriction from the act of the 13th was taken away as to houses in cities and towns corporate, but not so as to warrant any lease for any longer term than forty years. But the statute of the 18th of Eliz. made void all leases of ecclesiastical possessions, whereof there was any former lease having more than three years to run, and *all covenants for making such leases*. In consequence of these three statutes which seemed to impede the execution of the covenant to renew for 99 years, a contest arose in the year 1725 between the society of doctors at Doctors' Commons, and the dean and chapter: for then, not only the original term of 99 years was expired, but a subsequent term of 14 years (which in execution of a parliamentary power was added after the fire of London by order of the court of judicature created by the parliament on that occasion, and which so enlarged the 99 years when only 46 years of that term were unexpired into a term of 60 years) was within three years of expiring. Thus situate, the doctors filed their bill against the dean and chapter and Trinity-Hall, praying, that the dean and chapter might be compelled to renew to Trinity-Hall according to the exact terms of the covenant of renewal in the lease of 1567, or at least for 40 years, *and so from time to time in the way of perpetual renewal*. Under these circumstances of the case, the lord chancellor, with the concurrence of Lord Raymond and Judge Price, but against the opinion of Sir Joseph Jekyll, dismissed the bill of the doctors. But upon appeal to the House of Lords, the lords reversed the decree, and ordered renewal for 40 years for a fine of 20*l*., and under the ancient rent with the covenants and conditions in the original lease *except the covenant of renewal*.

Bettesworth v. Dean and Chapter of St. Paul, London, Hargr. Jurid. Arguments, 428; 1 Br. P. C. 240, S. C.

A lease was dated in 1744, and was of a water grist-mill, with houses, lands, a wear, and fishery, and was made in consideration as well of the lessee's *having at his own costs newly built a messuage or dwelling-house* on part of the premises demised, as of the rent and the covenants on the lessee's part: the lease was for ninety-nine years, determinable on the death of the survivor of three persons, at the yearly rent of 20*l*., and six salmon of 16 pounds each, and two hens: the lessee covenanted to repair, except in case of destruction of the mill, mill-stones, wear, and boat, by heavy rains in flood, or hard frost, and to leave the premises repaired, the lessor finding timber, brasses, and iron for the mill and wear, and carriage to them. Then there was a covenant by the lessee not to assign without the lessor's license. That was followed by a covenant by the lessor, that when and as soon as any two of the three lives should drop, and one only be left, the lessor, his heirs or assigns, would, on payment to him or them by the lessee, his executors, administrators, or assigns, of 20*l*. in the name of a fine, consent to add two lives more to the one life then in being, and to grant a new lease for ninety-nine years if the two new lives and the old life should so long continue, at the said yearly rent of 20*l*. and hens and salmon, on the same days and in the same manner as by the said old lease; such new

lease "to have and contain the *same covenants, reservations, provisoes, conditions, and agreements.*" Upon this lease with this covenant of renewal, the question was, Whether in a new lease there should be a covenant for renewal? And the bill was brought to force a covenant for that purpose. The cause was heard before Lord Thurlowe the 21st of April, 1788. At the first his lordship was inclined to dismiss the bill; but at last he ordered, that the cause should stand over to Michaelmas term, and that the plaintiff should be at liberty to bring an action on the covenant in the then term, and should proceed to try the cause in the next term. But no action was brought; and on the 4th of July, 1788, the plaintiff gave notice of a motion to have the minutes of the decree of the 21st of April varied, by substituting, instead of the directions therein contained, an order referring it to the Master to settle a lease according to the covenant *without a covenant for perpetual renewal.*

Reece v. Lord Dacre, Hargr. Jurid. Argum. 438; 2 Br. Ch. Rep. 638, S. C. cited.

Sir A. Langford, Bart. being seised in fee of several farms and lands in the county of Meath, on the 22d of March, 1697, demised the same to John Charles, his heirs, executors, administrators, and assigns, during the lives of Alice Charles his wife, Richard Charles their eldest son, and John Ward, and the longest liver of them, at the rent of 366*l.*, payable half-yearly, with the following clauses of renewal, viz. "That if the said John Charles, his heirs, executors, administrators, and assigns, within one full year next after the decease of any of the said persons, for whose lives the present demise and lease is taken, shall pay 100*l.* of good and lawful money, within the like space and time next after such decease as aforesaid, by way of fine, to the said Sir A. Langford, his heirs and assigns, he the said Sir A. Langford, his heirs or assigns, to whom such payment of 100*l.* shall be made as aforesaid, having then the immediate inheritance of the said lands and premises, and such person or persons that shall make such payment of the sum of 100*l.* by way of fine, then having two lives still in being, and undetermined of this demise; and the said person or persons then paying the sum of 100*l.* by way of fine as aforesaid, then likewise tendering to the said Sir A. L., his heirs and assigns, having the immediate inheritance of the said lands and premises, a pair of deeds of indenture of lease, fairly drawn and engrossed on parchment, purporting a deed of all and singular the said lands and premises, for the said two surviving lives mentioned and contained in these presents, and for the life of such other person as shall be nominated and appointed by such person and persons, paying such sum of 100*l.* by way of fine, and for the natural life of the longest liver of them, and under such reservations of rent, covenants, conditions, agreements, and clauses of renewal, as in the said indented deeds are specified and contained;—that then, and in such case, he the said Sir A. L., his heirs or assigns, having the immediate inheritance of the said lands and premises, and having received the said fine of 100*l.*, shall seal, deliver and perfect such new indenture of lease, so to be presented as aforesaid.—Provided, that the person or persons paying the 100*l.* fine as aforesaid shall at the same time deliver and perfect as his act and deed a counterpart of such new indenture of lease, and make sufficient surrender of the remaining interest hereby granted, and deliver up this present indenture to be cancelled. And it is further concluded and agreed by and between the said parties to the said indented deed, that the said Sir A. L., his heirs and assigns, having the immediate inheritance of the said lands and premises, shall, from time to

time, and at all times for ever hereafter, make all such further and other renewals and leases of the said lands and premises, unto the said John Charles, his executors, administrators, and assigns, for three lives, viz. the two remaining lives, and one other live to be nominated, at and under the reservations of rents, covenants, conditions, agreements, and clauses of renewal, as in the said indented deed are specified and contained,—Provided, that the parties requiring such renewal pay unto the said Sir A. L., his heirs or assigns, having the immediate inheritance of the said lands and premises, the sum of 100*l.* by way of fine, for every and each renewal, within the year next after the decease of each of the said lives respectively. And provided, that all former leases thereof be then sufficiently surrendered and cancelled." There was no covenant on the part of the lessee to pay the fine on renewal, or to accept a new lease *toties quoties:* nor was any fine paid on the execution of this lease. John Charles entered and had possession under the lease. On the 9th March, 1710, Alice Charles, one of the *cestuis que vie*, died, but no application was made for a renewal within the year, or for many years afterwards, though the lessee was frequently pressed by Sir A. L. to clear his arrears of rent, and take a renewal. In 1716 Sir A. L. died, having devised the estate to his nephew Hercules Rowley, the respondent's late father. In 1719, the lessee John Charles first made application for a renewal of the lease, and he then tendered to Mr. Rowley 100*l.* as a fine for the renewal, with interest from the 9th March, 1711, being after Alice Charles the *cestui que vie*'s death, together with a further 100*l.* for a second renewal, (upon a supposition that if the lease had been regularly renewed on the 9th March, 1711, and a life then inserted, such life would have subsisted no longer than seven years,) and interest also upon that last sum. He at the same time tendered a pair of leases, purporting a renewal for the life of Thomas Hendrick in the room of Alice Charles. These tenders being refused, and the renewal denied, John Charles immediately filed a bill against Mr. Rowley in the Court of Exchequer in Ireland, *inter alia*, to compel him to renew. By a decree of that court of the 21st February, 1723, this bill, so far as it related to a renewal of the lease, was dismissed. No motion was made to re-hear the cause; nor was there any attempt to reverse the decree. In 1746, Richard Charles, another of the *cestuis que vie* named in the lease, died, and within a few day of the expiration of the year after his death, a proposal was made to the respondent on the behalf of the appellant, who was the grandson of John Charles the original lessee, and entitled to an estate-tail in this leasehold estate under his will, for a renewal. This proposal the respondent refused to accede to, but apprehending from it that the appellant intended to pursue his claim to renewal, and being desirous that such claim should be brought to an early decision, he wrote to the appellant, offering to do every reasonable act to contribute to bring the matter to a conclusion with all possible despatch. The appellant, however, acquiesced above six years longer, till 17th September, 1754, when he filed a bill in nature of a bill of revivor of the suit which had been dismissed in 1723. But this bill, after several amendments and demurrers, was dismissed at the appellant's own request in Trinity term, 1759; and in the Michaelmas term following he filed another bill as a new original bill, praying that the respondent might be compelled to renew the lease of the premises, by executing a new lease thereof for the lives of the said John Ward, his present majesty, and the duke of York, with such reservations, conditions, covenants, clauses, and agreements as specified in

the lease made to John Charles, upon the appellant's making such compensation or satisfaction to him for the same as to the court should seem just and equitable; and that the appellant might have an allowance for the costs and expenses sustained by John Charles, and might be quieted in the possession of the lands; and that the respondent might be enjoined from proceeding at law concerning the premises till the hearing. To so much of this bill as sought a renewal of the lease; that the appellant might be quieted in the possession of the premises; and the respondent be enjoined from proceeding at law; or a discovery of such matters as were, or might have been in issue in the former cause, on certain particulars, which were afterwards answered, the respondent pleaded in bar the former bill and decree in the court of Exchequer in 1719 and 1723. This plea came on to be argued before the Court of Exchequer on 30th December, 1763, when the court allowed the plea, but without prejudice to such other methods of proceeding as the appellant might be advised to take, in order to obtain the relief sought by his bill. This order, however, was reversed by the House of Lords in England, and the plea was directed to stand for an answer, with liberty to except and to save the benefit thereof to the hearing. On the 20th of May, 1765, John Ward, the last *cestui que vie*, died, and the bill being amended in order to put that in issue, the cause came on to be heard on the 12th of November, 1772, when it was decreed by the Court of Exchequer that the bill should be dismissed, but without costs. From this decree the appellant appealed to the House of Lords, where it was affirmed.

Charles v. Rowley, 2 Br. P. C. 485, Apr. 14th, 1764.

By articles in writing of 4th October, 1734, James Hamilton demised to Gustavus Hamilton, the respondent's father, lands and mills in the county of Monaghan, to hold for the lives of the said Gustavus Hamilton and his two eldest sons, the respondent and George Hamilton, and the survivor of them, at the yearly rents therein mentioned, which the said Gustavus covenanted to pay: and it was agreed that leases should be perfected at the request of either party, containing a covenant of re-entry and distress, as also *a covenant of renewal for ever, paying half a year's rent as a fine in six months after the fall of every life then named, and thereafter to be named.* At the time when this demise was made, the fee of James Hamilton's estate was in fact in Nathaniel Kane, a mortgagee of it, to whom it had been conveyed absolutely by under-tenant lease and release, in 1729: but Mr. Kane had permitted Mr. James Hamilton to continue in possession of it, and verbally promised to reconvey it to him, upon his repayment of the purchase money and interest within five or six years. Mr. J. H., however, not having repaid the money within that time, Mr. Kane entered into possession, and shortly afterwards applied to G. H. to attorn tenant. In answer to this application G. H. said, that the rent was too high, and that he would give up the lands unless Mr. K. let them to him at a lower rent. Mr. K. thereupon consented to refer the yearly value of the land to the consideration of two persons, who valued them at 30*l.* a year; in consequence of which Mr. K. consented to G.'s continuing tenant at will at that rent. About the year 1752, G. H. being in arrear for the rent of the said premises, requested Mr. K. to take them off his hands, and to forgive him the arrears; upon which Mr. K. directed his agent, John Speer, to conclude this business with G. H. on his own terms. Speer and Hamilton accordingly settled matters between themselves, and the latter, about November, 1752, gave up the possession of the

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lands to Mr. K., either by a formal surrender, or by some writing purporting in substance to be a surrender, of which Speer soon after informed Mr. K., who rested satisfied with his account of the transaction without making any further inquiry. Soon after this, G. H. came to England, where he resided till August, 1755, when he died intestate, leaving the respondent, his eldest son and heir. In 1757, Mr. Kane died, and the appellant, his son and heir, entered and continued in quiet possession of the premises from that time till the year 1763, when the respondent applied to him for a renewal of the lease, pursuant to the articles. This being the first intimation the respondent received of the articles, or that any person claimed any interest in the estate under G. H., he communicated the same to his agent, Edmund Weld, in Ireland, he being himself at that time in England, and directed him to make strict inquiry into the respondent's claim. Weld accordingly wrote to Speer, informing him of the claim; and received an answer from him, in which he stated, that G. H. had made an actual surrender of the lease, which he (Speer) had given to Mr. Kane, and that he (Speer) had another actual surrender of it to Mr. K. A copy of this letter was sent by the appellant to the respondent, who never made any further claim during Speer's life, but soon after his death he filed a bill against the respondent in the Exchequer, praying to be restored to the possession of the premises, and that the appellant might be obliged to perfect leases thereof to him, renewable for ever, at the yearly rent of 36*l.*, and to account with him for the rents and profits since the death of G. H., and pay him what should appear to be due on such account. The respondent having put in his answer, and issue being joined, the appellant filed a cross bill, praying that the respondent in the original bill might search the papers, books, and entries of the said Gustavus Hamilton, and if there was any copy or entry of the said surrender, or any letter or acknowledgment from the appellant of his acceptance thereof, or relative thereto, that he might set forth the same *in hæc verba*, and might bring the same into court. It appeared, and was so admitted by the respondent's answer to the cross bill, that upon the death of George Hamilton, one of the *cestuis que vie*, in 1747, no application was made to Mr. K. for a renewal, nor was any step taken to enforce a specific execution of the articles, or to have a life inserted in his stead. It was also admitted by the respondent in his answer, that the great rise in the value of lands in Ireland since the year 1752, was the main inducement with him to attempt the recovery of the possession of this estate. But the respondent said, that he had been informed by G. H. that he never had made any surrender of the lease; in answer to which the appellant offered in evidence several letters of Speer to prove the fact of surrender; but these letters the court rejected, and decreed, that the respondent was entitled to a lease for three lives renewable for ever, and dismissed the cross bill with costs. Upon appeal to the House of Lords, in England, this decree was reversed, and the respondent's original bill was dismissed.(*a*)

Kane v. Hamilton, Ca. in the House of Lords, 1776. (*a*) Feb. 7th, 1776.

Edward Edwards being seised in fee of the manor of Hastings, and the lands therein comprised, situate in the county of Tyrone, by indenture bearing date the 28th October, 1685, gave, granted, enfeoffed, and in fee-farm let unto Thomas M'Causland, his heirs and assigns, the two town-lands of Claraghmore and Seagully, being part of the lands comprised in the said manor, to hold the same to him, his heirs and assigns, in fee-farm for ever,

viz., for the term of his natural life, and the natural lives of his two sons, Andrew and John M'Causland, and the longest liver of them, at the clear yearly rent of 15*l.* sterling, with two year old bullocks and one fat mutton. In the indenture there was contained (*inter alia*) a power of entry and distress for the rent, when in arrear, and an agreement, *that upon payment to the grantor, or his heirs or assigns, of the sum 7l. 10s. sterling, within three months after the fall of each of the said lives, he or they would add another life instead thereof, by a new indenture, continuing three lives for ever;* and a further agreement, that the said Thomas M'Causland, his heirs and assigns, should make appear, at every Easter court-leet, and view of frankpledge, to be holden for the said manor, by two sufficient witnesses duly sworn, that the said three lives were then in being, in default whereof, it should be lawful for the said Edward Edwards, his heirs or assigns, to distrain for the said fine, although all the said lives should be then in being. But there was not any power of re-entry reserved to the grantor, in case of non-payment of the said rent or fines, nor was there any clause which declared the rent void, if the grantee should neglect to renew. In the year 1708, the original indenture and the lands therein comprised having become vested in the respondent's grandfather, James Murray, and it being doubtful whether two of the lives named in that deed, had not fallen, the estate was renewed by Thomas Edwards, the son and heir of the grantor, according to the terms of the original, and two new lives were inserted in the room of those supposed to be fallen. In 1724, James Murray conveyed his interest in the estate to his son, George Murray, by virtue of which he entered into possession, and enjoyed the lands till his death; and during all that time paid the reserved rent. The said Thomas M'Causland, one of the lives named in the deed of renewal of 1708, died in the year 1741; James Murray, another of the said lives, died in the year 1746; and the said George Murray, the other of the said lives, died in 1763, intestate, leaving the respondent Sophia, his widow, and the respondent William, his eldest son and heir, then a minor, who thereupon became entitled to the said lands, under a marriage settlement, subject to a jointure to the respondent Sophia his mother. At this time, the appellant, the Countess of Ross, who was the grand-daughter of Thomas Edwards, under whom the lease was renewed, and who was entitled to these lands under her father's will, resided in England, where she continued till some time in the latter end of the year 1763, or the beginning of 1764. Soon after her return to Ireland, the respondents caused deeds of renewal to be prepared, pursuant to the covenants for that purpose in the original indenture of October, 1685, and sent the same to the countess, with a sum of money, as they alleged, sufficient to pay her all the renewal fines, with interest, which would be due to her on her executing such deeds of renewal. Instead of complying with this application, the countess brought an ejectment, in Easter term, 1763, for the recovery of the premises in question; upon which, before any judgment was obtained, the respondents, in June, 1765, filed their bill in the Court of Chancery, in Ireland, against the appellants, praying, That she might be compelled to execute a new lease of the premises in question, pursuant to the covenant for renewal in the said original indenture of October, 1685, under the rents and with the covenants in the said indenture contained; and that she might be restrained in the mean time by injunction from proceeding in the said ejectment. The appellant, Lady Ross, by her answer insisted, that the respondents were not entitled to a renewal upon two grounds; the one was,

an agreement made between James and George Murray with her father, Hugh Edwards, and in part carried into execution, for the purchase of their interest in the premises; the other was, that neither George Murray nor the plaintiffs had complied with the terms of the covenant for renewal, by not paying or tendering the fine within three months after the death of the lives. Issue being joined, several witnesses were examined on each side. The cause came on to be heard before the Chancellor of Ireland on the 20th of July, 1772, when the following issues were directed to be tried, viz., Whether any, and what agreement was entered into by the said James or George Murray for a sale of their interest in the said lands, and of the said lease thereof? And in case there was any agreement, whether the same was carried into execution, or whether the same was varied, or departed from, by the parties thereto, or either of them? The jury, by their finding, negatived any such agreement at all. The cause afterwards came on to be heard on the judge's certificate and merits, when the respondent's right of renewal was contested on the ground of laches in having neglected to renew; but the chancellor was pleased, on the 22d April, 1777, to order and decree, that the respondents were entitled to a renewal of the said lease, according to the true purport and intent of the said deeds of October, 1685, and November, 1708, upon payment of the several fines and interest; and of the rent and arrears of rent and duties become due. From this decree, and the said decree or order of 20th July, 1772, the appellants appealed to the House of Lords, in England, when their lordships were pleased to order and adjudge that the decrees be reversed, and the respondent's bill dismissed.

Bateman v. Murray, 5 Br. P. C. 20. Feb. 18th, 1779. This reversal occasioned considerable alarm in Ireland. It was said to clash with a *local equity, the old equity of that kingdom*, where these leases were considered on both sides as a kind of inheritance; where they had been introduced soon after the country was recovering from the convulsions of the great rebellion in the last century, with a view to the raising of a useful and respectable tenantry, and the improvement of agriculture; and where, upon that policy, they had ever been protected and preserved by the courts of equity, whose practice it had invariably been, to decree a renewal except where there was fraud, or dereliction on the part of the tenant. In consequence therefore of this alarm, an act was passed on the 19th and 20th of the King, c. 30, which revives the *old equity*, and provides, that in all cases of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant, by neglecting or refusing to renew after the landlord has demanded the fine, courts of equity shall relieve upon an adequate compensation being made. See Vernon and Scriven's Reports of Cases in Ireland, p 135, and the case of Magrath v. Lord Muskerry in the same book, p. 166; Boyle v. Lysaght, 1 Ridgw. P. C. 405, &c. But the clamour raised against this decision was without cause, and from a misconception of the ground on which it proceeded. The ground was fraud; not mere laches in neglecting to renew; the Lords considered the conduct of Murray, the agent, as fraudulent; so that the case was not within the tenantry act, and would be determined now as it was before the passing of that act. Lennon v. Napper, 2 Sch. & Lefr. 687. There is another case, Pendred v. Griffith, 1 Br. P. C. 314, with respect to which a similar mistake has gone forth under the sanction of high authority; for Lord Mansfield is made to say, 1 Ridgw. P. C. 185; that the decree was founded on the lapse and omission to renew within the time limited; whereas it must have been decided as a case of gross fraud, for the tenant had taken advantage of the ignorance of his own lessor, and received fines himself from his undertenants upon the fall of the very lives upon which he ought himself to have paid fines. These leases with covenant for perpetual renewal, arose in Ireland, as we are told by Lord Redesdale, instead of fee-farms. Persons purchased improvable estates; but having no money to carry on the improvements, they procured it in this manner: they paid, for example, 15,000*l.* for an estate, and conveyed it to another in fee-simple for 10,000*l.*, taking a lease of the whole, with covenant for perpetual renewal, at a rent equal to the interest of the 10,000*l.* There were many such leases, and they had a claim in reason and equity to be supported. Magrane v. Archbold, 1 Dow's P. C. 109.

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A and B covenanted in a lease for sixty-one years, that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying six pounds to the lessors they would execute another lease of the premises unto the lessee for and during the further term of twenty years, to commence from and after the said term of sixty-one years; and so in like manner at the end and expiration of every twenty years during the said term of sixty-one years, for the like consideration and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term last before granted. It was holden, that the lessee having omitted to claim a further term at the end of the first and second twenty years of the lease, could not claim a further term of twenty years after the end of the lease.

Rubery v. Jervoise, 1 T. R. 229.

In a lease granted in 1739, by the mayor and burgesses of Leominster for 99 years, determinable on three lives, there was a covenant on the part of the lessors, "that they and their successors, when and as often as either of the said three lives should die, and there should be *only two lives remaining in the premises*, if the lessee, her executors, administrators, or assigns, should, within the space of six months next ensuing the decease of such life, or at the first or second chamber which shall be held after the expiration of the said six months, apply for a new lease of the said premises, and pay a fine of 4*l.* for a new lease of the said premises, and pay the sum of 4*l.* to the bailiff, &c., with six months' interest for the said 4*l.*, after the rate of 5*l. per cent.* the said bailiff, &c. should add a third life in the said premises, and grant to her or them a new lease of the said premises for 99 years, to commence from the time of such payment, if the two other lives, and such other life as should be nominated by the said lessee, her executors, &c., or either of them, should so long live, under the like rents, covenants, and agreements, and to the several uses and trusts therein before declared, and so *from time to time ever after*, as often as the case should so happen." There were several renewals of this lease on account of the death of the *cestuis que vie:* the last was in the year 1763, and the lives for which the lease was then granted, were Adam Ward and Mercy his wife, and the plaintiff's. In 1764 Adam Ward assigned for a valuable consideration the beneficial interest in the lease to the plaintiff, who entered under such assignment. Adam Ward died in 1781 and his wife in 1789, and soon after her death, the plaintiff applied to the corporation for a new lease, offering to pay them 4*l.* with interest from the death of Adam Ward, and also 4*l.* as a fine for renewal, on the death of Mercy Ward, and a further sum of 4*l.* upon a supposition, that if plaintiff had renewed the lease on the death of Adam Ward, by putting in another life, such other life might have fallen in between the death of Adam Ward and Mary Ward. This the corporation refused, insisting that, no application having been made to renew till the falling in of the second life, they were not bound to renew upon the terms of the covenant, but were at liberty to impose such terms as they pleased. It was contended on the part of the plaintiff, that, although the covenant was only to renew on the falling in of one life, yet the spirit of the covenant extended to the case of two lives falling in: that the case lay in compensation, and that no forfeiture is to be incurred when compensation can be made. But Lord Chancellor said, the cases upon Irish leases in the House of Lords went the

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whole length of this case; that the plaintiff was not bound to renew upon the falling in of one life; he had his election whether to renew or not, and has made that election; the corporation therefore are not bound now to renew. It had been determined over and over in the Irish cases.

Bayley v. the Corporation of Leominster, 3 Br. Ch. Rep. 329; 1 Ves. jun. 476, S. C.

In an indenture of lease from the Marquis of Carnarvon to Thomas Landon, of messuages and lands at Stretton in the county of Hereford, for 99 years, determinable upon three lives, there was a covenant on the part of Lord Carnarvon, "that he, his heirs and assigns, shall and will from time to time, and at all times hereafter, at the request, costs, and charges in the law of the said Thomas Landon, his executors or administrators, when and as often, and within two years, to be computed from the day next after the death of the first or any or either of the life or lives by which the said premises are, shall or may be held and enjoyed, shall happen to die, renew and make a new lease or leases to him the said Thomas Landon, his executors or administrators, or any or either of them, of the said messuages or tenements, lands and premises herein-before demised, to commence from the expiration of these presents, and at and under the yearly rents and covenants herein-before reserved for one life, or 99 years, determinable upon such life, the said Thomas Landon, his executors or administrators paying or allowing for a fine, income or consideration for every such life so to be added, the sum of 53*l.* 5*s.* of lawful money, and so as often and in course one after the other as any of the life or lives in being, or any future life or lives shall, as before agreed to, be renewed, die, or depart this life. Provided such fine or fines be paid or tendered to be paid unto the said Lord Carnarvon, his heirs or assigns within two years, to be computed from the day next and immediately after the death or decease of any or either of the life or lives thentofore in being and so dying as aforesaid, and as often as one life or lives whereby the said demised premises shall be held and enjoyed shall die or depart this life. Provided always, and further it is agreed upon by and between the said parties to these presents, and it is the true intent and meaning hereof, and of the parties hereunto, that if upon or after the death of any of the life or lives herein before named, the said Thomas Landon, his executors or administrators shall refuse or neglect to renew the said lease, or make application therein, or to act in and name one other life or lives in the place and stead of any life or lives dying, over and above and more than the time and space of two years as aforesaid, and thereby also neglect or refuse tender of such new lease, and to pay unto or render to or for the use of the said Lord Carnarvon, his heirs or assigns, the sum of 53*l.* 5*s.* of lawful money, for a fine for such life, or consideration for every life to be hereafter added at or in the church porch of the parish church of Stretton aforesaid, and thereof give ten days' notice in writing unto the said Lord Carnarvon, his heirs or assigns, or agents for the time being, of such his or their intention and tender, then this indenture of lease, and every article, clause, and thing herein contained shall cease, determine, and be utterly void and of no effect." The Marquis of Carnarvon sold the demised premises to Guy's Hospital, subject to the lease, and soon afterwards died. Thomas Landon, the lessee, died about 1731. One of the lives died a long time since, the next in 1775, and the last in 1785. No application having been made for renewal of the lease previously to August, 1786, and no step having been taken in consequence of that neglect, the plaintiff, who had made herself the representative of the several persons interested in the lease, caused a written

notice, according to the provisions of the lease dated the 4th of August, 1786, to attend in the church porch for that purpose, to be fixed on the door of the church of Stretton. She also caused a copy of the notice to be served on the agent for the Hospital, who, upon the death of the last life, procured the tenants to attorn, and received the rents and profits of the premises. The plaintiff attended according to the notice, but no person attending for the Hospital, and her applications for renewal being rejected, she filed her bill, praying that the defendants should be decreed to grant a new lease upon payment of such fine, and upon such terms as to the court should seem just and reasonable.

Baynham v. Guy's Hospital, 3 Ves. 295.

The construction insisted upon for the plaintiff was, that the lessor will renew whenever any life or lives shall drop; that it is not said, that if they come at the end of the third life, they shall not have a renewal. I admit it upon that clause, said the master of the Rolls, but see the proviso which follows; that if upon or after the death of any of the life or lives, the said Thomas Landon, his executors, &c., shall refuse or neglect to renew, &c. Whatever doubt there may be on the first part, there can be none upon this clause; unless it is argued, that Lord Carnarvon not taking advantage of it, proves that he did not understand it so. But I lay out of the case the conduct of the party not availing himself of that clause; I cannot argue as the Court of King's Bench did in Cooke v. Booth; and am clearly of opinion, the lessee has not entitled himself to the benefit of the covenant, and the Hospital might, if they pleased, have ejected him for not applying when the first life dropped. Therefore the right of renewal is forfeited; the plaintiff has no claim here, and the bill must be dismissed.

In a lease of certain premises granted in November, 1759, by Lord Foley to Robert Moore, his executors, administrators, and assigns, for the lives of his three children, Robert, James, and Mary Moore, and of the longest liver of them, in trust for them successively, at the yearly rent of 60*l.* 3*s.* 4*d.*, it was covenanted, that when any one of them, the said Robert, James, and Mary Moore, should happen to die, then the survivors of them, their heirs and assigns, should within one year next after the death of such one of Robert, James, and Mary More, as should first happen to die, pay to Lord Foley, his heirs or assigns the sum of 42*l.* 6*s.*; and that Lord Foley should, upon receipt of that sum and request, and surrendering the said grant at the cost of Robert Moore the elder, his heirs or assigns, grant unto the survivors of them, the said Robert, James, and Mary Moore, and to such other person as the said survivors should nominate, for and during the natural lives of such two of them, the said Robert, James, and Mary Moore, as should happen to survive, and for the life of such third person as the said survivors of them, the said Robert, James, and Mary Moore should nominate, and for the life of the longest liver of them, for their natural and respective lives successively, and not jointly, at, for, and under the like rent, covenants, and conditions, as were therein contained and reserved: and moreover it was mutually granted and agreed, that in such grant to be made by Lord Foley, his heirs or assigns, unto Robert Moore the elder, his heirs and assigns (in trust as aforesaid,) it should be covenanted and agreed, that when and as often as any one of the said three persons, for whose life the said grant should be made, should happen to die, then the survivors of them should within one year after the death of such one person, pay to Lord Foley, his heirs or assigns, the sum of 42*l.* 6*s.*, and surrender the grant then in being, and

Lord Foley, his heirs and assigns, should, upon the payment of the said money, and surrendering up of the said grant at the request and charges of the said survivors of such lessees, execute another grant unto the survivors of such lessees, for and during the lives of such two of the said persons as should be then living, and for the life of such other person as the said survivors of the said lessees should nominate under the like rent, covenants, provisoes, and conditions as were therein contained: provided that when any two of such persons for whose lives such grant should happen to be made, should happen to die within one year, and before such new grant ought to be made according to the true meaning of the said lease, then the survivor of such lessees should, within one year next after the death of such second person of the said three persons for whose lives such grant should be made, pay to Lord Foley, his heirs or assigns, the sum of 102*l.* 6*s.*; and that Lord Foley, his heirs or assigns, should, upon receipt of the said money, and surrendering up of the grant then in being, at the request and charges of such surviving lessee, execute another grant unto such surviving lessee for the lives of such surviving lessee, and of such two other persons as such surviving lessee should nominate, at, for, and under the like rent, covenants, and conditions as were therein mentioned and contained.

Moore v. Foley, 6 Ves. 232.

Lord Foley, the lessor, died in 1766. Robert Moore the younger, one of the lives, died in 1793; upon his decease James Moore applied to Andrew Foley, devisee in trust of his father, Thomas Lord Foley, who died in 1777, for a renewal according to the covenants. No renewal could then be made, the then Lord Foley being under twenty-one, but an act of parliament was passed enabling Andrew Foley to grant and renew leases. In 1796, before any renewal, Mary Moore, another of the lives, died; upon whose death James Moore applied to have two new lives added. The parties differing as to the proper covenant to be inserted in the new lease, a bill was filed by James Moore, and it was referred to the master to settle a lease. The master, by his report, approved a lease containing a covenant for perpetual renewal? to which exception was taken by the defendant, and allowed by the master of the Rolls; for that there is not a word expressing that it was the intention of the parties that the lease should be renewable for ever; and that the covenant is specific, and extends no farther than to introduce the stipulation for a new lease into the second grant, and as to the lives only to be contained in that grant; that the proviso that the renewal shall be under the same rent, covenants, and conditions as in the first lease does not, in the absence of more positive stipulation, amount to a perpetual renewal; for that upon Tritton v. Foote, and Russell v. Darwin, he was bound to hold, that a covenant for renewal under the same covenants does not include the covenant to renew, but that it means only a second lease. not a perpetuity of leases.

In an indenture of demise by G H to D and S O, for the lives of E O, H O, and I I, at the yearly rent of 10*l.*; there was a covenant, "that D and S O, and the survivor, and the heirs, executors, and administrators of such survivor, should and would within the space of six months next after the decease of any of the said three persons for whose lives the premises were thereby granted, give notice to the said G H, his heirs and assigns, of the decease of such person or persons; and would, within the further space of six months, surrender that demise, and accept of a new lease of all the said premises, and therein add one or two life or lives to the life or lives

then in being, as the case should require; paying for the same unto the said G H, his heirs and assigns, as followeth, that is to say, if but one life to be added, the sum of 5*l.*; but if two lives were to be added, then the sum of 10*l.*; which said new lease should contain all the covenants and agreements, as were inserted and comprised in that grant or demise, and no other; and the said G H, for himself, his heirs and assigns, did covenant, promise, grant, and agree with the said D O, and S O, their heirs, executors, administrators, and assigns, that the said G H, his heirs or assigns, would at the request of the said D O and S O, or at the request of the survivor of them, or the heirs, executors, or assigns of such survivor, grant a new lease of the said premises thereby demised, and add one or more life or lives in the room of the life or lives so dying, for the considerations aforesaid; and that such new lease should contain all the covenants and agreements as were mentioned and comprised in that present grant and demise, and no more." A bill being filed for a renewal of the lease, the master of the Rolls was of opinion, that upon the true construction of this covenant, notice must be given upon the expiration of the first life, or at least within a reasonable time after the lessee knew of it; that the lessor had a right to it; but if not, he had a right after the death of the second; and there having been no formal notice given in this case of the expiration of the first life, nor any tender made of a lease to the lessor, till several years after the expiration of the second life, the plaintiff was not entitled to relief. His honour added, that he decided this case on the principles on which Lord Thurlow decided Bayley v. The Corporation of Leominster (*supra;*) that it is expected that these covenants be literally performed, where it can be done; and that equity will interpose and go beyond the covenant at law, only where a literal performance has been prevented by unavoidable accident, fraud, surprise, or ignorance not wilful.
Eaton v. Lyon, 3 Ves. 690.

In an indenture of lease of 29th September, 1783, for twenty-one years, there was a covenant that I D, (the original lessor), his heirs and assigns, at the end of eighteen years of the said term of twenty-one years, or before, upon request to him or them made by I I, E F, and S S, (the original lessees) their executors, &c. and at the costs and charges of the said I I, E F, and S S, their executors, &c. shall and will make, seal, and deliver unto the said I I, E F, and S S, their executors, &c., a new lease of the ground thereby demised, with the appurtenances, for the like fine or consideration of 5*l.* 8*s.* for the like time and term of twenty-one years, at the like yearly rent of 6*s.* 9*d.*, payable as herein-before mentioned, with all covenants, grants, and articles in the said indenture contained. At the expiration of the eighteen years, I I, applied to the person then entitled to the reversion, for a new lease upon the terms contained in the clause for renewal. A lease, with covenant for renewal, being refused, the lessee filed a bill, and the question was, whether the plaintiff was entitled to a lease containing that covenant? Lord Chancellor would not determine it, but retained the bill, with liberty to bring an action. Accordingly, an action of covenant was brought in the Court of King's Bench, and the plaintiff averred in his declaration, that the covenant in question had been introduced "in various other leases before then successively made and executed, on renewals from time to time granted," and assigned as a breach the defendant's refusal to grant a new lease, with such covenant for renewal as was contained in the lease of 29th September, 1783. The court decided that the plaintiff was not entitled to a new lease,

including the covenant for renewal; and their judgment was afterwards affirmed in error in the Exchequer Chamber. The judges were all clear, that a covenant for perpetual renewal could not be implied in this case, and that the renewals of the lease which had thentofore taken place, including the covenant in question, could not be used by way of argument on this occasion: that it was true that similar renewals were allowed to operate upon the judgment of the Court of King's Bench, in Cooke v. Booth, (*supra;*) but they thought that that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist in the construction of that deed. They said too, that all the authorities show that the judges by whom they were decided never thought of implying a covenant for perpetual renewal.

Iggulden v. May, 9 Ves. 325. See Dowling v. Mill, 1 Madd. 541; 7 East, 237; 4 N. R. 449; 2 Sch. and Lefr. 557.

The defendant had covenanted to renew the plaintiff's lease, at the request of the plaintiff, within three months before the expiration of the then granted lease. The lease being within a month of expiring, and the plaintiff not having requested a renewal, the defendant agreed to lease the premises to other persons. The plaintiff then being in possession, applied for a new lease, which defendant refusing, he filed his bill. The Lord Chancellor was clearly of opinion, that the plaintiff, having omitted to apply at the time agreed on, was not entitled to relief; observing, that if a lessee were relievable in such a case, he knew not where the court could stop; it would be saying, the lessee shall be loose, and the lessor bound.

Allen v. Hilton, 22d Feb. 1738; 1 Fonbl. Equ. Tr. 432. It may be observed, adds Mr. Fonblanque, that the case referred to was a lease of a colliery, which from the nature of the property, might have influenced the judgment of the court; and the chancellor certainly does appear, Mr. Fonblanque says, in his note on the case, to have adverted to such circumstance; but his lordship seems to have rested the decision upon general principles, and not upon the particular circumstances of the case.

A testator, tenant for years, under a prebendal lease renewable on payment of an arbitrary fine, entered into an agreement for the perpetual renewal of an under-lease at a fixed rent, in pursuance of which a lease to that effect was executed by the devisees. Lord Chancellor decreed the lease to be cancelled, and the agreement to be delivered up as obtained by surprise, neither party being aware of the effect of the agreement, because the fines payable to the prebendary were likely continually to increase, and yet no fine was to be paid on the renewal of the under-lease, and the reserved rent was not to be increased. Though it was admitted, that the under-lessee was an object of the testator's bounty, yet as the amount of the benefit intended could not be ascertained, the agreement could not be executed.

Willan v. Willan, 16 Ves. 72.

Where A, tenant for life, with power to make leases for twenty-one years at the best improved rent, made a lease to B, and therein covenanted, "for the term of his life to renew the said lease to B, his executors, administrators, and assigns, by giving them a lease for twenty-one years when applied to," and B surrendered the lease under a clause empowering him so to do; and afterwards on a new agreement, A endorsed on the back of the old lease, "I promise and agree to perfect a fresh lease to B, at any time he shall demand the same, at 5*l.* a year less than the within-mentioned rent;" it being uncertain whether the agreement was for more than one term of twenty-one years, and the agreement for a further lease (even if clear) being in

fraud of the power, a bill for a renewal of the lease for a second term of twenty-one years was dismissed.

Harnett v. Yielding, 2 Sch. and Lefr. 549.

Though there was a clear and express covenant for perpetual renewal, yet it having been provided in the original lease, that if the lessees declined taking a new lease of the premises, they should not only leave them in good and sufficient repair, but should also convey to the lessor, his heirs and assigns, certain lands and buildings between the lessor's premises and the river Thames: the court would not decree a specific performance of the covenant, because these last-mentioned lands had been converted into a highway, and, consequently, it would be impossible, if the lessees should at any time refuse to renew, for them to perform their part of the covenant.

City of London v. Mitford, 14 Ves. 41.

Where a lease for lives was renewable for ever, with a *nomine pœnæ* in case of neglect to renew; the court would not decree a renewal, except upon the terms of paying the penalty.

Lord Doneraile v. Chartres, 1 Ridgw. P. C. 122.

However, where a compensation can be made, where the tenant's neglect can be reasonably accounted for, it is the general disposition of courts of equity to relieve in a lapse of this kind. The measure of compensation introduced in Ireland by the Lord Chief Baron Gilbert was, by allowing the lessor septennial fines; that is, by giving him a fine for every seven years which had lapsed since the fall of a life, and interest upon each fine from the time of its being supposed to have accrued due, calculating from the probabilities of human life, that if another life had been added at the regular period of renewal, the duration of such life would not have exceeded the term of seven years. This was first done in one of the Duke of Ormond's leases: the duke had granted a lease in 1697 for the lives of the lessee, and his nephew John Anderson, and V B, and of the survivor, and had covenanted, "that as often as any of the lives should happen to fail, he would, at the request of the lessee, his heirs or assigns, and upon payment of all rents of the said premises, that should be then in arrear; and advancing and paying, by way of fine, within twelve calendar months next after the death of each life, 16*l.* 13*s.* 4*d.*, renew and make a new lease of the said several lands, &c., to the lessee, his heirs and assigns, at and under the yearly rent and reservations, and with the covenants, conditions, and provisoes contained in the said lease; with the like clause for being dispunishable of waste, and the like covenant for renewal of such two lives, as should be then in being, and also for one other life, to be added in the place and room of such of the three lives as should, from time to time, happen to fail. Provided, that, if when such new lease or renewal was to be made, more than one of the *cestuis que vie* before mentioned should be dead, there should be named in such lease so many other lives in their stead: and there should be paid to the person renewing a fine, of the value aforesaid, for each of the said *cestuis que vie*, who should be dead at the time of such renewal." The lessee himself died in 1714; and upon his death the respondent, who was the devisee of this estate, applied to the appellant, who had purchased the Duke of Ormond's reversionary interest, for a renewal of the lease, and that another life might be inserted in the room of that which had dropped; and at the same time tendered the fine of 16*l.* 13*s.* 4*d.*, all rent and arrears being discharged; but the appellant

refused to renew, insisting that John Anderson, one of the *cestuis que vie*, had been absent from Ireland ever since the year 1697, and therefore must be presumed to be dead, and that no tender of a fine for renewal having been made within twelve calendar months after his absence, the respondent had lost his right of renewal. The respondent thereupon filed his bill in the Court of Exchequer to oblige the appellant to renew the lease by inserting a new life in the room of the lessee's: but it appearing that John Anderson, the other *cestui que vie*, had been a long time absent from Ireland, and there being no positive proof of his being alive, the court ordered the bill to be amended by inserting a tender of the fine for the second life; and the respondent having made such tender, and amended his bill accordingly, they decreed the appellant to renew, and make a new lease to the respondent for the lives named in the bill, and according to the covenant in the lease, on the respondent's paying the appellant 16*l.* 13*s.* 4*d.*, with interest, from the 19th July, 1704; another sum of 16*l.* 13*s.* 4*d.*, with interest from the 19th of July, 1711; another sum of 16*l.* 13*s.* 4*d.*, and interest from the 19th July, 1718; and on the respondent's also paying to the appellant the sum of 16*l.* 13*s.* 4*d.*, being the fine due on the death of the lessee, and all rents in arrear, duties, &c., pursuant to the lease. And this decree, upon appeal to the House of Lords, was affirmed.

There is a difference between leases renewable upon lives, and leases for years; in the last, time is not in general considered as of the essence of the contract; and though the period agreed upon for requesting the renewal may have lapsed, still the agreement may be executed. But in the first, if the lessee neglects to renew upon a life dropping; it is obvious that by this omission in this case the situation of the parties is varied, and compensation for the lapse can scarcely be made. The life named at the proper time might have dropped, so that the contingent benefits lost to the lessor cannot be calculated. The circumstance of delay is very considerable. 14 Ves. 47, 58; Sweet v. Anderson, 2 Br. P. C. 430.

A lease was granted for 21 years, under the yearly rent of 1*l.* with a covenant on the part of the lessor to renew before the end of the term for a term of 21 years, and to renew from the end of such term for 21, 21, and 15 years more, making in the whole a term for 99 years. It was in effect, and so understood by the parties to be, a lease for 99 years. But the estate being copyhold holden of a manor in which no lease could be granted for more than 21 years, this mode was necessarily adopted in order to avoid a forfeiture At the expiration of the first term, there being an arrear of rent due, and no application made for a renewal, the executor of the devisee of the lessor brought an ejectment, and obtained judgment and possession. But, as the lessee was a bankrupt when this ejectment was brought; as it did not appear that there was not a sufficient distress upon the premises; but on the contrary it appeared, that the lessee had laid out a large sum of money upon them; as it was also in evidence, that the person to whom the lessee had mortgaged them, had endeavoured to stop the suit, by a treaty for a new lease which had been refused; as the covenant did not expressly require any request from the lessee for further terms;—under all these circumstances, the master of the Rolls held the lessee entitled to renewal on payment of the arrears of rent with interest, and the costs both at law and in equity.

Rawstone v. Bentley, 4 Br. Ch. Rep. 415.

An agreement was entered into in 1800, between A and B, for a farm to B belonging to A, for three lives generally, no particular lives being named. C afterwards purchased the farm subject to the agreement, and received rent from B, who occupied it under the agreement till 1807, when B discontinued

the payment of the rent, because C, who had not seen the agreement till that year, then refused to perform it. On a bill by B for a specific performance, naming the lives of three of his own children, the court below decreed accordingly, and that decree was affirmed in the House of Lords. For, as Lord Chancellor observed, the estate was purchased subject to the agreement, and the equity is, that the agreement should have been made good at the time of the purchase; and though it has been objected, that the naming of the lives now renders the performance a different thing (as it certainly does) from what it would have been if the lives had been originally named, since those lives might have dropt by this time; yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform, so that there seems to have been a mutual default. And it was upon this special ground that the decision proceeded.

Lord Kensington v. Phillips, 5 Dow's P. C. 61

A lease of lands in Ireland, renewable for ever, has been holden to be not absolutely forfeited by extinction of all the lives, and neglect to pay the fines for renewal, even after notice from the lessor.

Butler v. Mulvihill, Bligh's P. C. 137. See also Freeman v. Boyle, 2 Ridgw. P. C. 69.

A covenant that the covenantor, his heirs and assigns, shall and will renew the lease upon the fall of any of the original *cestuis que vie*, and instead of such life, insert such other life as A H, one of the *cestuis que vie* in the original lease, shall nominate, and that he will do so as often as any of the lives now mentioned in his said lease, or hereafter to be inserted, shall happen to die, is a covenant for perpetual renewal. For it is clear, that the tenant's right of renewal is not confined to the life of the covenantor, the covenant extending to his heirs; nor is it limited to the life of the tenant, A H being one of the *cestuis que vie* in the original lease; nor can it be limited to one renewal on the fall of each of the original *cestuis que vie*, for the covenant is express to renew not only upon the fall of the original *cestuis que vie*, but upon the fall of *any* life *thereafter* to be inserted in the lease in the place of the original lives.

Palmer v. Hamilton, 2 Ridgw. P. C. 535.

A, holding under a corporation, (of which he was a member,) and having obtained several renewals upon favourable terms, demised to B at a certain rent, with a covenant to renew at the same rent, as often as the corporation should renew to him; and the corporation at length raised the rent to him: it was holden that he was bound to renew to B on the old terms, unless he chose to abandon the property, and permit B to stand in his place for the renewal he had obtained; which, as he had not covenanted to renew with the corporation, he might perhaps be allowed to do.

Evans v. Walshe, 2 Sch. and Lefr. 519.

An estate was devised for the purpose of founding an hospital: the trustees procured letters patent for that purpose, with power for them to make orders and constitutions for governing the hospital; under which they ordained, that no lease should be made for above 21 years, the rent not to be raised, nor above three years' rent to be taken for a fine or *gressom*. The estate was originally leased at 120*l*. *per annum*. On a bill by the master and hospital, Sir Edw. Phillips decreed the lessee to enjoy, paying 120*l*. *per annum*, and afterwards the case was heard again by Lord Ellesmere, and although the lease was long before expired, his lordship decreed the lessee

to account at 120*l. per ann.* only, and to have a new lease for 21 years at that rent, notwithstanding it appeared the estate was, by the tenant's improvements, then worth 250*l. per ann.* In 1663 it was decreed again by Lord Clarendon, assisted by Hide, C. J., and Hale, C. B., that the lease, having been some time expired, the tenant should account from the expiration of the lease, at 120*l. per ann.*, and that he should have a new lease on reasonable terms and recommended it to the Archbishop of York to call the parties before him, and to certify what terms were thought reasonable for a lease, who certified the hospital had agreed to accept a fine of 100*l.* and 120*l. per ann.* The present tenant having purchased the lease, and laid out a considerable sum in improvements, filed a bill for renewal.—Lord Chancellor—The constitution that the rent should not be raised, is just and charitable, for the encouragement of the tenant to improve the estate ; and he ought to find a benefit in it ; and the hospital will also find an advantage in having the rent well secured by an estate of greater value and constantly paid. But the rule or constitution is not to be followed according to the letter, that no more rent is to be taken than what was at first reserved; but as times alter, and the price of provisions, &c., increases, so the rent ought to be raised in proportion. The tenant is entitled to a beneficial lease, but not at any certain rent: the constitution is not to be regarded in the letter, but in the reason of it. His lordship therefore declared, that the plaintiff was not entitled to have leases of the premises from the hospital for any fine certain, or at any certain rent; but that he ought to have beneficial leases made to him as well in regard to the constitution of the hospital, as also the former decrees made by the Lord Keeper Coventry and Lord Chancellor Clarendon, and the usage since, and likewise in respect of what the plaintiff had laid out in building and other lasting improvements upon the premises, and that the fine or fines to be paid by the plaintiff to the hospital for such beneficial leases ought not to exceed three years' value of the premises, and referred it to the master to certify the value of what had been laid out in improvements since the last leases made by the hospital beyond the covenants in such leases, and what the annual value of the premises are reasonably worth to be let ; and when that was ascertained, he referred it to the Archbishop of York, to certify what fine and what rent he thought reasonable ; but which fine was not to exceed three years' value, and in the ascertaining of such rent and fine, regard was to be had to the repairs of the hospital, and what the plaintiff, and two persons of the name of Blackistone, former lessees, under whom he claimed, had expended in building and other lasting improvements upon the premises beyond the covenants in the hospital leases, and in the last leases, consideration being had, &c. And it was ordered by a further decree of the 24th July, 1710, that the plaintiff should pay to the hospital the sum of 705*l.* for a fine, the same not exceeding three years' value of the premises, exclusive of 120*l. per annum* for improvement. And the court, being fully satisfied that by the original constitution of the hospital, as likewise by the said decree of the Lord Keeper Coventry and the Lord Chancellor Clarendon, the Blackistones had, and the complainant who claims under them, hath a tenant right of renewal of the said leases from the hospital, and ought therefore to have beneficial leases thereof made to him, declared the complainant should pay for the future but 150*l. per annum* reserved rent to the hospital.

Watson v. Hinsworth Hospital, 2 Vern. 596. The case of this hospital has lately been before the court on a bill to enforce a claim of perpetual renewal upon the ground of

usage sanctioned by these decrees, and upon expenditure; but the claim was dismissed as not supported by the custom of the country, nor by contract, and not within the powers of the lessor nor according to the true construction of the decrees. Watson v. The Master, &c., of Hemsworth Hospital, 14 Ves. 324.

So, where a decree had been made by the Lord Coventry, for granting a lease of charity lands to J S (who had been at great expense in recovering them) for 99 years, determinable upon lives, at the rent of one-third of the then improved value, to be renewable from time to time for ever without fine according to the value of the lands settled by a commission of survey directed by the court for that purpose; it was decreed, that the lease should be renewed *toties quoties* without any fine, at and under the yearly rent of one-third part of the improved value. And as to the construction of the words in the Lord Coventry's decree relating to the improved value upon the renewal of leases, though it was capable of referring to the improved value in that survey, yet it was capable of a more liberal construction of referring to the improved value, which might afterwards be; and this being of greater advantage to the charity was the better construction: but such improved value ought to be taken not as it is at the several times of renewal, but as it stands at the time the court shall call for a new valuation to be set. And after proceeding to direct a new survey, it was declared, that to support the justice and intent of the said former decree, the defendant ought to have the lease renewed according to the improved value appearing on such survey.

Attorney-General v. Smith, 2 Vern. 746. See 14 Ves. 333. See Mr. Raithby's note (1) to this case in his edition of Vernon's Reports.

In mortgages and settlements of leases of this kind, it is usual to insert provisions for renewal. In mortgages, there is generally an agreement, that if the mortgagor neglects to renew, it shall be lawful for the mortgagee to renew, and that the fine and charges of renewal shall be a charge upon the premises, and bear interest. In settlements, there should be a power authorizing the trustees, from time to time, to renew the leases, and for that purpose, to raise money by mortgage.

Where such a provision is not inserted in a mortgage, the mortgagee cannot indeed compel the mortgagor to renew, but he may do it himself, and the money which he may so lay out shall be added to the principal of the mortgage, and carry interest.

Manlove v. Ball, 2 Vern. 84; Lacon v. Mertins, 3 Atk. 4; 1 Wils. 34, S. C., by the name of Lucam v. Mertins.

Upon the omission of such a provision in a settlement, the expenses of renewal are to be borne by the several persons interested in the estate in proportion to their respective interests. The old rule of ascertaining this proportion was by making the tenant for life pay one-third of the expense or keep down the interest, and the remainder-man the other two-thirds.

This rule perhaps may be proper where the nature of the estate, the will of the testator, or the circumstances of the case compel a renewal; but as a general rule, it would frequently be wrong: for suppose the devisee or grantee for life to be one of the persons upon whose life the estate is holden, and a renewal to be made by him; in this case, as there is no obligation upon him to renew, as the law will not permit him to renew but on the trusts of the settlement, and as he cannot possibly in any way enlarge his own interests, the fine and expense of the renewal must, in justice, be paid entirely by the remainder-man. This is evidently the case, where the devisee for

(U) Of the Renewal of Leases, by whom, &c.

life has the legal estate, and it should seem, that it is the same, where he is a *cestui que trust*. Suppose again, an estate of limited duration, as an estate for years, or for the lives of strangers, to be limited to one for life, without any obligation upon him to renew; if such a person renew, it is manifest, that the contribution of a third must, in most cases, be very unfair and unequal. This rule therefore no longer prevails; but the rule now seems to be, that the proportion follow the benefit; that the contribution of a person having such limited interest in the estate, and voluntarily renewing, shall only be in proportion to the benefit which he actually derives from such renewal.

Verney v. Verney, 1 Ves. 428; Ambl. 88, S. C.; Stone v. Theed, 2 Br. Ch. Rep. 243; Lock v. Lock, 2 Vern. 666; Buckeridge v. Ingram, 2 Ves. jun. 652; White v. White, 4 Ves. 24, on a re-hearing, 5 Ves. 554, on an appeal to the chancellor, 9 Ves. 554; Lord Penrhyn v. Hughes, 5 Ves. 107; Addis v. Clement, 2 P. Wms. 459; Nightingale v. Lawson, 1 Br. Ch. Rep. 440; 1 Cox, 181, S. C. corrected; Stone v. Theed, 2 Br. Ch. Rep. 243; Allan v. Backhouse, 2 Ves. & Beam. 65; Charlton v. Driver, 2 Brod. & Bing. 345; Montfort v. Cadogan, 2 Mer. 3; 17 Ves. 485; 19 Ves. 635. In this case of White v. White, as also in Buckridge v. Ingram, 2 Ves. jun. 652, the master of the Rolls is said to have holden that the tenant for life ought to pay nothing but the interest. Lord Eldon, however, when the case of White v. White came on before him on appeal, disapproved of the doctrine, on the ground of the possible inequality. The cases had decided, that it was better to determine the proportion upon fact, than speculation: therefore if the tenant for life is bound to pay in any degree, he ought to pay in proportion to the benefit he *de facto* takes under the effect of the transaction, and the remainder-man ought also to pay, with reference to his proportion of the benefit; that is, that interest in the renewed term, which was *ultra* so much of the renewed term as expired in the life of the person who renewed the term. And the same course was followed in Allan v. Backhouse, 2 Ves. & Beam. 65; 1 Eden, 456, n.—If the estate be charged with annuities, the annuitants are not bound to contribute to the expense of renewal. Maxwell v. Ashe, Nov. 6, 1752; 1 Br. Ch. Rep. 444, n.; Moody v. Matthews, 7 Ves. 174.

{If a lease for 99 years determinable on three lives be conveyed in trust for A for life, and A covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing a new life in the room of such as shall fail, he may, on one of the lives failing, procure a renewal *on his own life*, and his covenant will not thereby be broken. The parties might have provided against that by inserting a covenant that he should leave the estate with as many lives as he received it.

1 Bos. & Pull. 455, Scudamore v. Stratton.}

If a lease for years from a college be limited by will to persons in succession, the remainder-man may oblige the first taker to renew, and contribute to the fine paid on the renewal.

Reddington v. Reddington, 1 Ball & Beatty, 142.

Where a testator devised a church-lease, in which were his own and his wife's life, to his wife for life with remainders over, but without any direction for the renewal of the lease by adding other lives; and the wife renewed the lease for two additional lives, and paid for the renewal 500*l.*; Lord Chancellor ordered the money to be a charge on the estate (exclusive of the wife's life) with interest from the time of its being advanced.

Adderley v. Clavering, 2 Br. Ch. Rep. 659; 2 Cox, 192, S. C.; Verney v. Verney, Ambl. 88; Lawrence v. Maggs, 1 Eden, 453.

A leasehold estate renewable being bequeathed with limitations in the nature of a strict settlement, and the custom being to renew annually and

to underlet, it was decreed that the fines upon renewal ought to be paid out of the rents and profits, and that the tenant for life, undertaking so to pay those fines, was entitled to the fines on renewal of the under-leases; and a renewal to such of the tenants as should be desirous of it, was directed.

Milles v. Milles, 6 Ves. 761.

In the case of leases for lives, renewable for ever, the whole inheritance is bound by the contract for renewal, and, without special reservation, the lessor has no interest beyond the performance of the conditions of the tenure. In Ireland a lease for lives with such a covenant seems to have been considered as not within the statute of Gloucester, 6 E. 1, and therefore an injunction in the nature of a writ of estrepement of waste has been refused against such a tenant, any farther than as it might restrain him from an act to the prejudice of the reservation in the original lease.

Calvert v. Gason, 2 Sch. & Lefr. 561.

A body restrained by its constitution from granting leases for more than twenty-one years, cannot any more covenant for a renewal of the term than originally grant a lease exceeding the prescribed limits.

Watson v. Hemsworth Hospital, 14 Ves. 333; Lydiatt v. Peach, 2 Vern. 410; Taylor v. Dulwich Hospital, 1 P. Wms. 655.

A power under an act of parliament to lessee, his executors, administrators, and assigns, to grant building leases, does not extend to a person not coming in by assignment from him, but merely deriving from him the tenant-right to claim a renewal; though it was agreed by the court that a renewed lease may be considered as the original lease in endurance to some intents, that is, for the protection of legal interests carved out of it, which, once well created, the law does not permit to be destroyed.

Collett v. Hooper, 13 Ves. 255.

A renewable lease is not inconsistent with a covenant in a deed of trust for the benefit of creditors to let and set to the best advantage; for this trust for the benefit of creditors is temporary, and not like a trust for a charity, which is of a permanent nature,(*a*) and where it is to be presumed trustees do wrong in granting long leases.

Kirkham v. Chadwick, 13 Ves. 547. (*a*) See vol. ii. *supra*, 205, 206.

‖ Where the assignee of a lessor of a lease for lives, renewable for ever on payment of a fine certain, gave notice to pay the renewal fines, and of breaches of covenant by encroachment, &c., upon the latter of which a long correspondence took place, it appearing that the tenant was always willing to pay the fines, although no tender had been made; it was held that the neglect to pay them for three years was not, under the circumstances, unreasonable, and that the tenant was entitled to a renewal, reserving the rights of the lessors as to collateral matters.

Trant v. Dwyer, 1 Dow. N. S. 125; S. C. 2 Bligh, N. S. 11.

Where a lease not warranted by a power is granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved on the lease, does not confirm it so far as to make the covenant of renewal binding on him.

Higgins v. Rose, 3 Bligh, 113.‖

β If a person who has a particular or special interest in a lease, obtains a renewal of the lease in consequence of his being in possession as tenant, or from his having such special interest, the renewal is considered in equity as

(V) Miscellaneous Cases.

a mere continuance of the original lease, for the protection of the rights of all parties who had any legal or equitable interest in the old lease.

Phyfe v. Wardell, 5 Paige, 265.

When the tenant remains in possession of the demised premises after the expiration of the term, without any new agreement, the law presumes that he holds the premises subject to all such covenants, contained in the original lease, as are applicable to his present situation

Phillips v. Monges, 4 Whart. 226.

A lease containing a clause that at the end of the term buildings should be taken at a valuation, or the lessors would grant a new lease for the term of twenty years, upon such terms as such lessors, their heirs, &c., might think proper, and as should be approved by the tenant, &c. Held, that the clause was void for uncertainty.

Whitlock v. Duffield, 1 Hoff. R. 110.

A covenant to renew a lease implies another lease for the same term and rent, but not with all the covenants contained in the former lease, such covenants being incidental but not essential parts of a lease.

Rutgers v. Hunter, 6 Johns. Ch. 215. See Carr v. Ellison, 20 Wend. 178.

A covenant with the lessee by the lessor to renew a lease for years at the expiration of the term, is a covenant running with the land.

Piggot v. Mason, 1 Paige, 412.

When an agreement for a lease contains no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only the usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced in the lease.

Propert v. Parker, 3 My. & Keen, 280.

A clause in a lease, by which the lessor agrees that "if the lessee require it, he will have the privilege of remaining in the house seven years longer at the same rent," is a substantial part of the contract, transferable with the lease.

Mossy v Mead, 2 Louis. R. 161.

(V) Miscellaneous Cases.

Where a lease of land for a valuable consideration, received of an ecclesiastical society, was executed to E G, the minister of that society, for the use and benefit of the ministry, during the lessor's natural life and his successor's good pleasure; it was held, that the estate created by the lease was determined by the death of the lessee.

Merwin et al. v. Campb. et al., 3 Conn. 35.

If the lessee by express stipulation in the contract of lease, be prohibited from transferring the lease to a third person, without the lessor's written consent, yet the lessee's executor may transfer the lease, even against the executor's will.

Barron v. Duncan, executor et al., 6 Louis. R. 103.

Where a lease stipulates that the lessee shall pay all state, parish, and city taxes, and keep the side-walks in repair, it cannot be construed to extend to the payment of the expenses of making the pavement of the street in front of the leased premises.

Municipality No. 2 v. Currell et al., 13 Louis. R. 320.

The lessee is bound to allow the necessary repairs to be made on the leased

premises. He cannot avail himself of the occasion to abandon the lease, but may have an allowance by a suspension of the rent for the time he is obliged to quit for this purpose.

Pontalba v. Domingon et al., 11 Louis. R. 194.

If the lessee quit the premises with the consent of the lessor, or assign over his term with such consent, or be evicted by a title paramount to that of the lessor, it will be a determination of the lease, or at least will discharge the lessee from the payment of any future rent.

Wood v. Partridge, 11 Mass. 488. See 11 Mass. 494.

A leased a fulling and carding machine to B for a year, for which B was to pay three hundred dollars rent. It was agreed that B should repair the mill, machines, and mill-dam, keep the same, with the exception of the dam, in good condition, deduct the expense out of the rent, and deliver the premises to A, at the expiration of the term, in good repair. After B had repaired the dam, A was to keep it in good repair throughout the term; and he also covenanted that B should quietly enjoy the premises. B took possession of the premises, and A, on the same day on which the lease was dated, assigned it to C. C brought an action against B alleging a breach of covenants on the part of the latter: held that C could not sustain this action; that this lease could not be assigned while B continued to hold the term and B the reversion; that these were not such covenants real as run with the land, unless A had transferred to C the reversion; and that under this lease B could have assigned his term, and A granted away his reversion.

Allen v. Woolley, 1 Blackf. 149.

When there is a parol demise for three years, void by the statute of frauds, and the lessee enters, and becomes a tenant from year to year, he is bound by an undertaking to repair contained in such void demise.

Richardson v. Gifford, 3 Nev. & M. 325; 1 Adol. & Ell. 52.

If a person takes lodgings on the first and second floor of a house, he has a right to use the door-bell, the knocker, the sky-light of the stair-case, and the water-closet, unless it be otherwise stipulated at the time of taking the lodgings.

Underwood v. Burrows, 7 C. & P. 26.

An under-tenant who is in possession at the termination of the original lease, and is permitted by the reversioner to hold over, is *quasi* a tenant at suffrance.

Simpkin v. Ashurst, 1 C. M. & R. 261; 4 Tyrw. 78

Lease to M E, *habendum* to her and her heirs for the lives of a son and daughter, and a grand-daughter of A E, and the survivor: A E had a daughter, but no grand-daughter. Held, it inured as an estate for the two lives, but not of a person not then in existence.

Doe v. Edwards, 1 Mees. & W. 553; 1 Tyr. & Gr. 1006.

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